

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

In the Matter of)	
)	
WORLDCALL INTERCONNECT, INC.)	
a/k/a EVOLVE BROADBAND,)	
Complainant)	File No. EB-14-MD-011
)	
v.)	
)	
AT&T MOBILITY LLC,)	
Defendant)	

JOINT STATEMENT PURSUANT TO 47 C.F.R. § 1.733(b)(1)(i)-(iv)

AT&T Mobility LLC (“AT&T”) and Worldcall Interconnect, Inc. (“WCX”) (together, the “Parties”), hereby submit this joint statement pursuant to 47 C.F.R. § 1.733(b)(1)(i)-(iv) to the Federal Communications Commission (the “Commission”). This joint statement is being submitted along with the Parties’ Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues.

I. PROSPECTS OF SETTLEMENT

As explained below, the Parties have very different views on how the Commission should resolve the matters at issue in this proceeding, and as such have reached an impasse in their negotiations. That being said, the Parties have now fully delineated their positions on the contested issues in their respective submissions and are hopeful that—with the benefit of that record—the Commission Staff will be in a position to provide guidance on the issues pertaining to the appropriate level of roaming usage and the roaming rates to be charged. The Parties agree

that with guidance from the Commission Staff on these issues, the prospects of the Parties reaching an overall settlement would be greatly improved.

II. DISPUTED ISSUES

The Parties' respective views as to the fundamental issues in dispute and how the Commission should address those issues are set forth below.

A. WCX'S POSITION

The Parties remain far apart on a relatively few number of fundamental and overarching issues. Most notably, the Parties completely disagree on the appropriate level of roaming usage, whether roaming capability can be used for Machine to Machine (M2M) and "Internet of Things" ("IoT") applications, and the roaming rates to be charged. The Parties also have starkly different views as to the extent to which each other's proposals are controlled by and consistent with the Commission's roaming rules,¹ the *Voice Roaming Order*,² the *Voice Roaming Reconsideration Order*³ and the *Data Roaming Order*.⁴ Finally, the parties have disagreements on whether the concepts of "just and reasonable and nondiscriminatory" or "commercial reasonableness" apply to certain uses and then how the Commission's enunciated "factors"⁵ will

¹ 47 C.F.R. §20.12(a), (d) and (e). AT&T also contends that WCX is trying to obtain "resale" rather than roaming even through requirements for CMRS sunset over ten years ago pursuant to rule 20.12(c). WCX denies that it is seeking "resale" and asserts that its proposals entirely involve "roaming."

² *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, First Report and Order, 22 FCC Rcd 15817 (2007) ("*Voice Roaming Order*").

³ *In re Reexamination of Roaming Obligations of Providers*, Order on Reconsideration, 25 FCC Rcd. 4181 (2010) ("*Voice Roaming Reconsideration Order*").

⁴ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd 5411 (2011) ("*Data Roaming Order*").

⁵ The Commission set out 11 non-exclusive consideration factors to assess individual disputes over automatic roaming in *Voice Roaming Reconsideration Order* ¶¶39-40, and 17 non-exclusive consideration factors to assess individual disputes over data roaming in *Data Roaming Order* ¶¶86-87.

be balanced and resolved with regard to each of the various uses in issue in this specific proceeding.⁶

1. Introduction

WCX holds the 700 MHz B-Block for Cellular Market Area (“CMA”) 667. The licensed area is approximately 11,000 square miles and has a population of less than 400,000 people. The territory contains 13 Texas predominately rural counties inside the triangle formed by Austin, Houston and San Antonio. A significant percentage of the population routinely travels to these major population centers to work, shop, obtain medical care, or for education. WCX has built-out about 35% of the territory to date, and is currently providing LTE-based interconnected voice, interconnected data, text-messaging and wireless broadband Internet access service to customers within range of the network. WCX is entirely LTE; it has no other fully licensed mobile spectrum authorizations in any area, and does not provide any 2G or 3G services. WCX does not presently have roaming capability with any provider, and this presents a significant drag on subscription given the highly mobile nature of WCX’s existing and potential customer base.

In AT&T’s reality the roaming rules are narrow, with only incidental impact, and they do not actually provide a meaningful mechanism for small rural wireless providers to participate in a seamless traditional market. AT&T contends that small providers are (or should be) completely foreclosed from emerging markets like M2M. AT&T sees “resale” behind every door; roamers are piggy-backing on AT&T’s network. Roaming prices should be so high that roaming is never or only infrequently used. Home carriers must provide roaming at an extreme loss by design. Any use beyond a tiny percentage overwhelms the primary home use and that is a bad thing. Despite AT&T’s cramped vision of what roaming is, there are a multitude of available host

⁶ Virtually all of the other issues presented for decision in this matter are subsidiary to the primary issues, with the possible exception of the Parties’ dispute over “network management”/“monitoring.”

providers that can stand in stead of AT&T, and any carrier that wants roaming can easily go to them for seamless nationwide connectivity. In AT&T's world there is a wide array of fully-functional devices that will work on every band and every network. WCX does not need AT&T, and AT&T does not want to truck with WCX or any other "free-rider" for that matter.

WCX does not live in AT&T's alternate universe and does not believe it should be forced to have a contract not based in reality or fairness. The applicable decisions and rules, and WCX's experience on the ground, comprise an entirely different reality – one that is based on facts and logic rather than factoids and fallacies. The automatic and data roaming rules were promulgated so that roamers could indeed roam. The Commission does not intend for roaming to be diminutive in scope or use, or crushingly expensive for the subscriber and home provider. The Commission did not sunset or repeal the automatic roaming rule when it promulgated the data roaming rule. Interconnected services are still covered by 20.12(d) and AT&T's LTE network is not exempt from automatic roaming duties. Out-of-home area roaming is not "resale." Rural providers need out-of-home area roaming in order to have a competitive and viable home area service that consumers and businesses in the home area will purchase. Price matters regardless of whether the standard is "just and reasonable" or "commercially reasonable"; a roaming rate that is the prevailing retail rate "cubed" does not pass either test, particularly in the specific circumstance of a home provider for rural areas where the subscribers will be roamers in significant measure. WCX does not, in fact, have a host of alternative sources for nationwide roaming. There is no multitude of off-the-shelf multi-band devices that will work on all other networks. AT&T is the only present technically compatible network that can host WCX's roamers.

The parties read the same rules and orders yet they come away with completely opposing conclusions regarding what the Commission intended to occur. The Commission must tell us which world we actually live in.

2. This case involves 20.12(d) automatic roaming and 20.12(e) commercial data roaming.

WCX seeks automatic and data roaming from AT&T under rules 21.12(a), (d) and (e). AT&T is the most natural roaming host carrier under the circumstances. AT&T possesses the 700 B-Block licenses for each of the nearby population centers and is the primary “nationwide” holder of technologically-compatible spectrum. WCX is attempting to establish “a pre-existing contractual agreement” between WCX (as the home carrier) and AT&T (the host carrier) so that WCX’s “roaming subscriber[s] [are] able to originate or terminate a call in the host carrier’s service area without taking any special actions.”⁷ WCX provides “interconnected” voice and data services and text-messaging. WCX wants to also support M2M and IoT applications. These too will be “interconnected services” since they will be “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.”⁸ In other words, WCX’s M2M and IoT offerings will be “interconnected data service,” *not* “commercial mobile data service.”⁹ AT&T has the

⁷ See rule 20.3 (definition of “automatic roaming”).

⁸ See rule 20.3 (definition of “interconnected service”).

⁹ “Commercial mobile data service” is defined in rule 20.3 (emphasis added):

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.

legal obligation to provide “automatic roaming” to facilitate WCX’s “interconnected” voice, data and text-messaging services and its obligations are governed by rule 20.12(d), not 20.12(e).

To be sure, WCX also seeks a rule 20.12(e) roaming arrangement for WCX’s non-interconnected commercial mobile data services and in particular wireless broadband Internet access. AT&T’s argument that *only* “commercial mobile data roaming” is in issue, however, is simply wrong. The fact that WCX seeks a commercial mobile data roaming arrangement for its non-interconnected service merely means rule 20.12(e) is *also* in issue along with 20.12(d) for WCX’s interconnected services.¹⁰ When AT&T’s LTE network is supporting a roamer that is using a WCX interconnected voice, data or text-messaging service then AT&T will *not* be providing non-common carrier “commercial mobile data roaming” but will instead be providing “automatic roaming” – a common carrier service.¹¹

AT&T’s repeated citation to *Verizon v. FCC* and the D.C. Circuit’s holding regarding common carrier regulation over commercial data roaming is unavailing. Commercial mobile data service roaming for non-interconnected services is different from automatic roaming for interconnected services. Automatic roaming is and has always been, common carrier. The *Verizon* court was clearly aware that automatic roaming for interconnected service is different from commercial mobile data roaming for non-interconnected services, and its decision in fact keyed off of the fact that the former is common carrier while the latter is not.¹²

¹⁰ *Data Roaming Order* ¶75 anticipated that roaming complaints would involve both “voice” and “data” roaming: “Moreover, some roaming disputes will involve both data and voice and are likely to have factual issues common to both types of roaming.” AT&T, however, is trying to make this a “data roaming only” case even though interconnected services are also involved.

¹¹ *Voice Roaming Order* ¶¶2, 8-9, 18, 23-26.

¹² See *Cellco P’ship v. FCC*, 700 F.3d 534, 538-539 (D.C. Cir. 2012):

The Commission has previously determined and here concedes that wireless internet service both is an “information service” and is not a “commercial mobile service.” See *Broadband Classification Order*, 22 F.C.C.R. at 5915-21 ¶¶ 37-56; Verizon’s Br. 11 n.6, 19 n.11. Accordingly, mobile-data providers are statutorily immune, perhaps twice over, from treatment as

When AT&T's LTE network is supporting a roamer that is using a WCX non-interconnected commercial mobile data service then it is correct AT&T will be providing non-common carrier "commercial mobile data roaming" and not common carrier "automatic roaming." But AT&T's argument that rule 20.12(e) – which applies only to non-interconnected services, non-CMRS services – exclusively governs this case notwithstanding the fact that common carrier interconnected services are also in issue cannot be squared with the plain meaning of the applicable definitions and substance of the relevant rules and is wholly inconsistent with the history of roaming and its legal underpinnings.

common carriers. *See id.* Given that mobile-voice providers are considered common carriers, the exclusion of mobile-data services from the common carriage regime subjects cellphone companies like Verizon, which provide both services, to a bifurcated regulatory scheme. *Cf. National Association of Regulatory Utility Commissioners v. FCC (NARUC II)*, 533 F.2d 601, 608, 174 U.S. App. D.C. 374 (D.C. Cir. 1976) (noting that a single entity "can be a common carrier with regard to some activities but not others"). Even though wireless carriers ordinarily provide their customers with voice and data services under a single contract, they must comply with Title II's common carrier requirements only in furnishing voice service. Likewise, the Commission may invoke both its Title II and its Title III authority to regulate mobile-voice services, but may not rely on Title II to regulate mobile data.

The Commission's foray into roaming began in 1981 when it adopted a limited voice roaming requirement as part of the original cellular-service rules. *See An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, 86 F.C.C. 2d 469, 502 ¶¶ 75-76 (1981); *see also Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile-data services*, 26 F.C.C.R. 5411, 5412 ¶ 3 & n.2 (2011) ("*Data Roaming Order*") (explaining origins of roaming regulation). As cellphones grew ubiquitous and nationwide travel more frequent, the need for more robust roaming regulations became clear. Although some carriers were voluntarily entering into roaming arrangements with other providers—under which the subscribers of one carrier could roam on the network of the other—in many cases subscribers of smaller carriers remained unable to use their mobile phones when traveling outside their home networks. Seeking to promote nationwide access to cellphone service, the Commission in 2007 dramatically expanded carriers' roaming obligations by mandating that they offer roaming agreements to other carriers on a just, reasonable, and nondiscriminatory basis. *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 F.C.C.R. 15817, 15818 ¶¶ 1-3 (2007) ("*2007 Voice Roaming Order*"). In using this classic common carriage standard, the Commission expressly invoked Title II, explaining that mobile-voice providers have "a common carrier obligation" to provide roaming. *See id.* at 15818 ¶ 1. Three years later, in 2010, the Commission further expanded and clarified voice providers' roaming obligations in ways not relevant to this case. *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile-data services*, 25 F.C.C.R. 4181, 4190-4201 ¶¶ 18-40 (2010) ("*2010 Voice Roaming Order*"). Under these *Voice Roaming Orders*, subscribers of a small carrier in Nebraska, for example, can travel to New York and use Verizon's cell towers to make phone calls. Demonstrating the success of the orders, most cellphone users experience no service disruption when traveling beyond their provider's service range.

3. WCX is trying to obtain roaming terms and is not seeking resale of any type, “backdoor” “de facto” or “piggybacking.”

AT&T is also incorrect when it asserts WCX is seeking “resale.” WCX wants to arrange for its home area customers to be able, for the first time, to be “roamers.”¹³ AT&T will not be providing a finished AT&T retail service to either WCX or its subscribers. AT&T’s activity will be limited to device authentication and then transmission to the physical hand-off location between WCX and AT&T. WCX’s core network will be involved with, and control, every communication. That cannot be plausibly said to be “resale” of AT&T’s retail service. Nor is WCX seeking “roaming” as a ruse to provide service to “users residing outside WCX’s service area.” AT&T’s contrary contention wholly ignores WCX’s evidence that every WCX customer affected by the roaming arrangement will reside in, or have a significant connection to, WCX’s home area. Every customer will have a physical presence in the home area, through residency, a business location or equipment and application software hosted in WCX’s core network. Every customer will subscribe to, and receive, a WCX-provided and managed interconnected or non-interconnected mobile service as a condition of being able to then also be a “roamer” on AT&T’s LTE network.

4. WCX has invested, and will continue to invest, in its home area but is hindered by the present lack of roaming capability. Roaming on reasonable terms will allow WCX to invest even more.

WCX has built out 35% of its licensed area and is compliant with the Commission’s build-out requirements. WCX fully intends to continue expanding and improving its 700 MHz B-block LTE service provision footprint within CMA 667.¹⁴ WCX’s efforts in this case relate to

¹³ Rule 22.99 defines a “roamer” as “[a] mobile station receiving service from a station or system in the Public Mobile Services other than one to which it is a subscriber.” The “roamers” will be WCX home-area subscribers that desire seamless nationwide connectivity when they are outside of WCX’s home area. All roaming will occur out of the home-area, and WCX is not seeking “home roaming.”

¹⁴ On December 5, 2014 WCX was provisionally selected for “Category Three” funding to extend wireless

fulfilling its home-area customers' legitimate expectation and desire for seamless nationwide connectivity and the ability to use their WCX service when they are *outside* of WCX's home area. If WCX's subscribers do not have the ability to be roamers when they are away from the home area then they are less likely to purchase service for use when they are *inside* the home area. WCX's service does not at present match up with customer needs and expectations, and people are less likely to purchase service. If and when WCX secures roaming capability on reasonable and viable terms then it can attract more home-area customers by providing a complete service that meets customer expectations. WCX will receive more revenue, be on a more secure financial footing and will be able to invest even more in the expansion of its home-area network.

5. AT&T's proposed prices are not just and reasonable for automatic roaming or commercially reasonable for commercial data roaming; WCX's proposed prices are reasonable under both measures.

AT&T's proposed prices do not pass muster under either 20.12(d) or (e) because they are grossly excessive under both. AT&T's contention that other providers have agreed to the prices it proposes here cannot be validated, and even if true that "fact" is irrelevant in any event. The question is whether the price is "just and reasonable" (for automatic roaming) or "commercially reasonable" (for commercial mobile data roaming) as it relates to the totality of the circumstances applicable to WCX's specific situation. AT&T's proposed price might well serve AT&T's interests, since it would indeed lead to little or no roaming and a princely sum paid to AT&T for the miniscule amount that does occur. But the "commercially reasonable" standard must also take WCX's interests and needs into account, and the facts demonstrate that WCX would not be able to offer a viable full-fledged roaming-capable service to its home area

broadband service in 34 census blocks within CMA 667. See Public Notice, DA 14-1772, *Wireline Competition Bureau Announces Entities Provisionally Selected For Rural Broadband Experiments; Sets Deadlines For Submission Of Additional Information*, WC Docket No. 10-90, Attachment B, p. 3 (Dec. 5, 2014).

customers if AT&T's prices are used since WCX's customer base spends so much time within AT&T's area. Even if WCX somehow imposed limits so there was only a miniscule amount of roaming, WCX would still not have any gross margin, and would indeed operate at a significant loss. WCX will not be able to offer roaming to its customers and will be foreclosed from entering the smartphone services market – even for its own area – under AT&T's proposals. That cannot be what the Commission intended and it is not reasonable.

WCX's proposed price, on the other hand, would still provide considerable revenue to AT&T, along with a very nice profit. This is necessarily so since AT&T would receive the retail rate but would be providing far less functionality than it does for its retail customers. Since the present market mandates a single price for both home and roaming use, WCX would have to absorb the roaming cost and still recover its internal costs in order to earn any margin. If the WCX-proposed rate of \$10 per GB is used, WCX will still have every incentive to reduce roaming use (or not encourage excessive use) in order to achieve a better gross margin.

6. AT&T's apparent proposal that it be allowed to engage in content and application monitoring is not just and reasonable or commercially reasonable.

AT&T has been very careful about not disclosing exactly what its proposed contract terms would allow (or not prohibit) in terms of AT&T's ability to engage in content or application monitoring. We still do not know if AT&T's terms would let AT&T surveil the content of WCX users' communications, thereby invading their privacy and destroying their property rights. We do not know if AT&T will be identifying what applications or services WCX users employ while roaming, and then prioritizing the traffic based on the application or service type. We do not know if any prioritization will be the same as that for AT&T's retail customers, or different from that for AT&T's customers. AT&T keeps justifying the as-yet unidentified and unexplained "network management" terms by saying it must manage congestion, maintain

security and be able to suspend service. WCX's terms allow AT&T to manage congestion, maintain security and suspend service in the event of a threat of harm to AT&T's network.¹⁵ The dispute is whether AT&T will be engaging in "traffic management" to obtain *other* ends unrelated to either congestion or protection against network harm. So far AT&T has assiduously refused to engage on the actual dispute and to date neither WCX nor the Commission have any idea precisely what network management practices AT&T's proposed terms would allow and what practices AT&T intends to apply. WCX proposes an industry standard direct roaming connection with no service aware capabilities. AT&T admits WCX's proposal is industry standard but has yet to explain why AT&T is refusing to allow it. WCX has also provided evidence that its technical terms and conditions are nearly identical to roaming agreements used by another nationwide carrier, except for the band plans.

7. AT&T misapprehends and misapplies the process and evaluation factors applicable to this case.

a. What is the "question" and what is the "remedy"?

AT&T's Legal Analysis p. 22 states 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. 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

¹⁵ The Parties have a separate dispute over whether AT&T should be able to suspend roaming during dispute resolution. WCX has, however, never questioned AT&T's right to suspend in the event of a legitimate threat of network harm, and WCX's terms expressly allow AT&T to do so. *See* RWA Model Agreement ¶12.

established the presumption that the requesting carrier's request is reasonable.¹⁶ 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.¹⁷

AT&T really misses the mark when it says that the “only issue” is whether AT&T’s data roaming proposals are commercially reasonable. 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.¹⁸ WCX detailed its claimed violations ¶¶41(A)-(E) in the Second Amended Complaint. 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.¹⁹ 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*.

b. Evaluation factors.

Voice Roaming Reconsideration Order ¶39 listed 11 non-exclusive consideration factors. *Data Roaming Order* ¶86 had 17 non-exclusive factors. Many of the 11 are similar to the 17.

¹⁶ Rule 20.12(d) incorporates the presumption.

¹⁷ *Data Roaming Order* ¶¶79, 80.

¹⁸ See *Data Roaming Order* ¶79.

¹⁹ Second Amended Complaint ¶41(B) and (D).

AT&T claims that the 17 *Data Roaming Order* factors “clearly define the commercially reasonable standard.”²⁰ AT&T also finds guidance from “the core policy goals of widespread availability of data roaming and the need to encourage facilities-based investment.” WCX agrees that guidance can be found from the somewhat differently stated core policy goals set out 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 puts too much weight on the “investment” side of the balance, and on that side wholly ignores the fact that without roaming a rural provider will be less able to invest in the home area. AT&T’s terms (and its preferred “balance”) frustrate the other core goals: (1) seamless coverage nationwide, (2) seeking new entrants, (3) innovation, and (4) promoting competition by multiple providers.

AT&T correctly recognizes that many of the 17 *Data Roaming Order* factors are not applicable in this complaint.²¹ Negotiating conduct is not (or should not be) an issue in this proceeding. Nor is technological compatibility in dispute. That leaves the *Data Roaming Order* factors dealing with what AT&T calls “marketplace considerations.”²² WCX does not agree with that characterization, but it appears that the parties now agree which *Data Roaming* factors are in play in this case. Although AT&T does not mention it, there is considerable overlap between the

²⁰ AT&T Legal Analysis p. 15. AT&T wholly ignores the 11 *Voice Roaming Reconsideration Order* factors, presumably because of its contention rule 20.12(d) is not in play.

²¹ All of the *Voice Roaming Reconsideration Order* factors except factor 10 apply. But each of the remaining ones overlaps with a *Data Roaming Order* factor that is also in play.

²² AT&T Legal Analysis p. 18.

applicable *Voice Roaming Reconsideration Order* factors and the applicable *Data Roaming Order* factors. WCX will summarize its position on them, and denote where the two sets overlap:

- *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;*²³

WCX cannot 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. WCX could not be on the cutting edge of innovative, new features, capabilities and functions. The AT&T terms are 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;*²⁴

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 that is not what this factor – which asks if the complainant and respondent had a prior agreement with similar terms. Even if the other agreements were relevant to this factor neither WCX nor the Commission can at present 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;*²⁵

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.

²³ This roughly equates to *Voice Roaming Reconsideration Order* factor 1.

²⁴ This roughly equates to *Voice Roaming Reconsideration Order* factor 7.

²⁵ This resembles *Voice Roaming Reconsideration Order* factor 2.

- *the extent and nature of providers' build-out;*²⁶

WCX has built-out approximately 35% of its licensed area, and is committed to further expanding its network. WCX has 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. WCX will continue to build out its network, but it will take longer if WCX cannot obtain reasonable roaming terms.

- *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;*²⁷

AT&T claims WCX should 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;*²⁸

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;*²⁹

If WCX does not secure roaming on reasonable terms it will be hindered in its ability to finish financing the rest of its home area build-out. The Commission has repeatedly recognized that lack of out-of-home-area roaming could have this effect.³⁰ 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;*³¹

²⁶ This is somewhat similar to *Voice Roaming Reconsideration Order* factor 3.

²⁷ This is essentially the same as *Voice Roaming Reconsideration Order* factor 4.

²⁸ This is essentially the same as *Voice Roaming Reconsideration Order* factor 5.

²⁹ This resembles *Voice Roaming Reconsideration Order* factor 6.

³⁰ *Voice Roaming Order* ¶¶28; *Voice Roaming Reconsideration Order* ¶¶18, 21, 23; *Data Roaming Order* ¶¶11, 13, 15, 16-17, 18, 20-21.

³¹ This roughly equates to *Voice Roaming Reconsideration Order* factor 8.

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;*³² and,

There are circumstances outside of WCX's control that 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.*³³

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 foregoing factors are not exclusive. 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. Orszag Declaration ¶48 (p.18) admits that "commercial reasonableness" is met by an agreement that both parties can say is in their "mutual self-interest." This "economic" criterion is similar to WCX's expression 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." If one applies Orszag's test then AT&T's proposed terms miserably fail.³⁴ 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

³² This is very similar to *Voice Roaming Reconsideration Order* factor 9.

³³ This is very similar to *Voice Roaming Reconsideration Order* factor 11.

³⁴ Roetter Reply Declaration pp. 5-6.

meet the actual goals the Commission articulated. To the contrary, they are specifically designed to frustrate all of them.

i. AT&T's other agreements are as-yet unproven and irrelevant

AT&T repeatedly touts all of its extant agreements. AT&T 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.”³⁵ 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.”³⁶ There is no presumption that terms accepted by some carrier other than WCX are presumptively reasonable as against WCX. WCX will, if necessary, explain why those terms are problematic – either in general or given WCX’s particular circumstances once we are allowed to see them – but there is no “presumption” that WCX must overcome. This case must be decided “on a case-by-case basis, taking into consideration the totality of the circumstances presented in each case.”³⁷ AT&T has made no effort to prove that its proposed terms in particular meet WCX’s particular needs or (using the Orszag test) are in WCX’s “self-interest” or that of the residents in WCX’s licensed area. That is what they must do, and have yet to do. In any event, AT&T’s claim that all of the wireless carriers with these roaming agreements are giddy with joy over the terms they obtained, and are

³⁵ AT&T Legal Analysis pp. 3-4 provides one of the many places where AT&T makes these arguments.

³⁶ *Data Roaming Order* ¶81 (emphasis added).

³⁷ This identical sentence appears in both rule 20.12(d) (automatic roaming) and 20.12(e) (data roaming).

enjoying extraordinary success using them, has no basis in reality. To the contrary, AT&T's "happy campers" are presently irate and seeking commission action in Docket 05-265.

ii. AT&T's other agreements do not account for M2M or IoT.

Another reason AT&T's other agreements do not serve much purpose is that they were not negotiated with M2M or IoT in mind, and AT&T's terms appear to assume that M2M and IoT use will be "commercial data roaming" even though in WCX's case it will actually involve an interconnected data service. AT&T's terms would completely bar WCX from in any way supporting M2M or IoT even if usage levels stayed within AT&T's maxima. This is so because AT&T would likely consider any arrangement WCX made with an M2M or IoT application service provider to be prohibited "resale." Other aspects of AT&T's terms assume that a "roamer" must be a "customer," and, indeed a human being or corporation. That rules out lightbulbs, appliances, cows and all the other "things" that will comprise the "Internet of Things."

AT&T's terms violate the roaming rules because they do not provide for automatic roaming for WCX's interconnected voice and data services. They are unreasonably restrictive in terms of use and volume, and the price is orders of magnitude too high. If AT&T's terms expressly or implicitly contemplate that AT&T can or will surveil actual content or "manage" applications or services for any reason other than to deal with congestion or to maintain security then they are unreasonable under both standards.

B. AT&T'S POSITION

Notwithstanding the broad array of unsupported factual assertions, wide-ranging policy issues, and overheated rhetoric that WCX presents in its lengthy summary of its position, in

AT&T's view, the only matter at issue is whether AT&T's data roaming proposal falls within the range of commercially-reasonable terms and conditions.³⁸

If the Commission concludes, as AT&T contends it should, that AT&T's data roaming proposal is commercially reasonable, this case would be at an end. WCX could then agree to AT&T's proposal, propose some other commercial arrangement for the use of AT&T's network, or seek roaming, resale, or some other arrangement with one or more of WCX's many other potential commercial partners. It is only if the Commission concludes that AT&T's proposal is not commercially reasonable that the Commission would then consider WCX's proposal (*i.e.*, the RWA Model Agreement).³⁹ As explained below, WCX's proposal would allow WCX to use the agreement to offer services to users residing outside of WCX's service area without any practical limitation, and at rates which are well below any data roaming rates available in the market. Such terms amount to a "backdoor" resale agreement and render WCX's proposal commercially unreasonable. Further, in no event can the Commission impose the terms and conditions that WCX has proposed based on the Title II "automatic roaming" standards.

In deciding the matters at issue in this case, the first question that the Commission must address is the nature and scope of its "commercial reasonableness" standard. Because the *Data Roaming Order* is clear that data roaming is not a "common carrier" service—a position the

³⁸ Throughout its argument, WCX makes unsupported misstatements regarding what it characterizes as AT&T's positions and AT&T's subjective views of "reality." *See supra* at 3-5. For example, WCX argues that "AT&T contends that small providers are (or should be) completely foreclosed from emerging markets like M2M." *Id.* at 3. That is not AT&T's position. *See Meadors Decl.* ¶ 41 ("AT&T has no issue with WCX selling M2M services to its customers, but . . . WCX should do so by selling services to customers that reside in its own network coverage area or through a resale agreement with a facilities-based carrier for customers that reside in its network coverage areas"). That misstatement and others are addressed in AT&T's prior factual and legal submissions.

³⁹ WCX disagrees, arguing that "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." *See supra* at 12 (citing *Data Roaming Order* ¶¶ 79, 80). The *Data Roaming Order* makes clear that the relief advocated by WCX is available "to resolve a particular roaming dispute in which a violation of the rules is found." *Data Roaming Order* ¶ 79 (emphasis added). Conversely, "[i]n cases where no violation of [the Commission's] 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." *Id.*

Court of Appeals for the District of Columbia Circuit found to be “obvious”⁴⁰—there is no merit to WCX’s claim that AT&T’s provision of data roaming services is actually governed by Title II and the common carrier obligations of the *voice* roaming rules.⁴¹ It is also clear that the commercial reasonableness standard is a much more flexible standard than the Title II “just and reasonable” standard.⁴² As such, the Commission’s data roaming rules necessarily allow for more differentiation in agreements than does the “just and reasonable” standard of common carriage regulation, granting wireless providers such as AT&T wide latitude in proposing data roaming rates in commercial negotiations.

The *Data Roaming Order* sets forth seventeen, non-exhaustive factors the Commission may consider in determining the commercial reasonableness of a particular proposal.⁴³ As explained in the Declaration of Jonathan Orszag, those factors fall into three general categories:

- *Negotiation Factors*: the host provider’s response to the request for negotiations and the existence and terms of the parties’ other data roaming agreements;
- *Competitive Factors*: the impact of the proposed terms on consumers, the extent of the requesting provider’s build-out of its own wireless network, and the impact of the

⁴⁰ See *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014) (citing *Cellco P’ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012)) (finding it is “obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers”).

⁴¹ In discussing the service that AT&T is being asked to provide, WCX concedes that “AT&T’s activity will be limited to device authentication and then the transmission to the physical hand-off location between WCX and AT&T.” *Supra* at 8. That service, which involves AT&T’s transmission of data to WCX, is not subject to automatic roaming rules because AT&T is not offering “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.” 47 C.F.R. § 20.12(a)(2). Indeed, WCX has admitted that (i) “to AT&T the communications will look like non-interconnected related communications,” (ii) “AT&T will not perform many of the same functions it has historically undertaken with regular roaming voice calls or text message,” and (iii) “[t]o AT&T it will be no different than when WCX’s customer is surfing the web or receiving an e-mail.” Sec. Am. Compl. at 271-72; see also Legal Analysis at § III(A). In these circumstances, the automatic data roaming rules do not apply. Regardless of what services WCX may be offering to its customers, AT&T would only be providing non-interconnected data roaming to WCX. Consequently, the roaming rules that are applicable in this case are the Commission’s *data* roaming rules, not the automatic roaming rules. *Id.* at 43.

⁴² See *Data Roaming Order* ¶ 33 (“host providers [] control the terms and conditions of proffered data roaming arrangements, within a general requirement of commercial reasonableness”).

⁴³ *Id.* ¶¶ 2, 85-86.

proposed terms on the requesting provider's incentives to further invest in its wireless network; and

- *Technical Factors*: technological compatibility and feasibility between the requesting and host providers.⁴⁴

Of particular significance in assessing the commercial reasonableness of a data roaming proposal are the terms conditions of existing data roaming agreements that have been negotiated on an arm's-length basis in the commercial marketplace.⁴⁵ Indeed, the Commission has established a *presumption* that the terms and conditions in data roaming agreements negotiated at arm's length in the commercial marketplace are commercially reasonable.⁴⁶

The record evidence overwhelmingly establishes that AT&T's proposal to WCX is commercially reasonable. As both Messrs. Orszag and Meadors demonstrate in their declarations, the terms and conditions of AT&T's proposal are comparable to those of more than 35 data roaming agreements that AT&T has negotiated on an arm's-length basis with other wireless providers.⁴⁷ In addition, the rates that AT&T proposes not only are at or below the rates it generally charges to other providers, but are also well below the rates that both AT&T and other providers pay for data roaming.⁴⁸ Other factors that weigh in favor of a finding that AT&T's proposal is commercially reasonable include: (i) the proposal maintains WCX's incentives to invest in its own wireless network,⁴⁹ rather than engage in *de facto* resale;⁵⁰

⁴⁴ Orszag Decl. ¶ 30.

⁴⁵ For the first time in this proceeding, WCX purports to rely on factors identified by the Commission in the *Voice Roaming Reconsideration Order*. See *supra* at 14-16 nn.21-33. As previously noted, automatic roaming does not apply here because, as WCX admits, AT&T would provide only "device authentication and then transmission to the physical hand-off location between WCX and AT&T." See *supra* at 8.

⁴⁶ See *Data Roaming Order* ¶ 81 ("we will *presume* . . . that the terms of a signed agreement meet the reasonableness standard") (emphasis added).

⁴⁷ See Meadors Decl. ¶¶ 7-8, 17, 23, 39, 42-44, 47, 49, 59, 64, 67; Orszag Decl. ¶¶ 39, 48-62.

⁴⁸ See Meadors Decl. ¶¶ 47-49; Orszag Decl. ¶¶ 52-53.

⁴⁹ See *Data Roaming Order* ¶¶ 21, 51.

⁵⁰ See *id.* ¶ 88.

(ii) AT&T negotiated with WCX in good faith in both 2011-12 and 2014 (and WCX does not contend otherwise⁵¹); and (iii) the proposal preserves AT&T's right, as the host provider, to maintain control over its own wireless network.⁵² Finally, the fact that WCX has not presented any commercial data indicating that AT&T's proposal is dissimilar to the terms and conditions of other data roaming agreements in effect between providers in the marketplace is significant, particularly in light of the fact that WCX has the option to roam on other providers' networks.⁵³

In contrast, WCX's proposal plainly is not commercially reasonable. For one thing, WCX has not presented any evidence that its proposal (or anything remotely similar) has been accepted in the commercial marketplace. Instead, WCX is requesting that the Commission compel AT&T to charge what WCX characterizes as the "prevailing retail rate" for data roaming despite the Commission's previous refusal to engage in the "prescriptive regulation of rates."⁵⁴ WCX also ignores the *Data Roaming Order*'s clear focus on preventing "backdoor" resale⁵⁵ by failing to provide any meaningful usage restrictions in its proposal. Likewise at odds with the *Data Roaming Order* is WCX's proposal to strip AT&T of its right to manage its wireless network by sharply limiting AT&T's ability to monitor network traffic levels, address network congestion, and suspend service. There is nothing in the *Data Roaming Order*, the Commission's other rules, or other legal precedent requiring AT&T to accept such one-sided terms.

⁵¹ Meadors Decl. § III.

⁵² Legal Analysis § II(C).

⁵³ Prize Decl. § III.

⁵⁴ See *Data Roaming Order* ¶ 21.

⁵⁵ See *id.* ¶ 88

Finally, the Parties' joint submission is designed to aid in the "[s]implification or narrowing of the issues" by the Commission at the status conference.⁵⁶ Here, however, WCX is seeking to *expand* the existing issues in this proceeding by including new arguments that it could have made, but did not make, in the more than 2,500 pages it already has submitted. For example, as previously noted, WCX includes new arguments regarding factors relevant to *voice roaming agreements*,⁵⁷ and an extended discussion from the D.C. Circuit's analysis in *Cellco*.⁵⁸ Neither of these arguments was raised in WCX's initial legal analysis or in its reply legal analysis, and it is simply inappropriate for WCX to raise new arguments in the guise of summarizing its *existing* position about the disputed factual and legal issues.

That being said, none of the arguments raised by WCX comes close to demonstrating that AT&T has failed to comply with its obligations under both the *Data Roaming Order* and Commission Rule 20.12(e). To the contrary, the evidence clearly establishes that AT&T's proposal is commercially reasonable. Accordingly, WCX's Complaint should be dismissed.

III. DISCOVERY

The Parties both have sought discovery with respect to the matters at issue in this proceeding. WCX posed nine interrogatories in its complaint filing and five additional interrogatories in its reply submission. For its part, AT&T posed ten interrogatories in its answering submission. During the December 3, 2014 meet-and-confer, the Parties discussed in detail the outstanding interrogatories as well as the need for depositions. A summary of the Parties' discussions on those issues is set forth below.

⁵⁶ 47 C.F.R. § 1.733(a)(1), (b)(2).

⁵⁷ See *supra* at 14-16 nn.21-33.

⁵⁸ See *supra* at 7 & n.12.

A. AT&T'S INTERROGATORIES

As noted above, AT&T posed ten interrogatories in its answering submission. WCX interposed partial objections to eight of those interrogatories, but generally agreed to produce information responsive to each of AT&T's interrogatories. During the December 3 meet-and-confer, the Parties discussed each of AT&T's interrogatories and the scope of certain of AT&T's interrogatories was clarified. There currently are no outstanding issues regarding AT&T's interrogatories to WCX.

B. WCX'S INTERROGATORIES

During the December 3 meet-and-confer, the Parties also discussed the fourteen interrogatories that WCX had posed to AT&T. As a result of those and follow-up discussions, the Parties have resolved all of the outstanding issues regarding WCX's interrogatories to AT&T. A summary of the status of each of WCX's interrogatories is set forth below.

- *AT&T's Dealings with MVNOs (Interrogatories 1, 5, and 6)*: Following a lengthy discussion at the December 3 meet-and-confer regarding both the relevance of the requested information and the precise scope of the requests, WCX indicated that it is seeking two categories of information: (i) documents actually comparing the rates paid to AT&T by MVNOs to AT&T's data roaming rates; and (ii) an interrogatory response describing, on a summary basis, the (a) technical differences between the services provided to MVNOs as compared to AT&T's data roaming services and (b) rates currently charged by AT&T for MVNO services. As a result of further discussions, AT&T has agreed to conduct a reasonable search of the files of its data roaming organization for responsive, non-privileged documents comparing, on the one hand, the rates paid to AT&T by MNVOs and, on the other hand, AT&T's data roaming rates, and to provide in an interrogatory response the summary information that has been requested.
- *Data Roaming Agreements (Interrogatory 2)*: As a result of the Parties' discussions, AT&T has agreed to produce the data roaming agreements referenced in its answering submission and to respond to the other aspects of this interrogatory subject to the following conditions: (i) WCX's Motion to Strike is withdrawn; (ii) the agreements are produced as HIGHLY CONFIDENTIAL under the Protective Order; (iii) AT&T's roaming partners are given notice and an opportunity to object to the production consistent with AT&T's contractual obligations; and (iv) WCX's right, under the Protective Order, to challenge AT&T's designation of the agreements as HIGHLY CONFIDENTIAL is preserved. By separate pleading, the Parties have submitted an

Agreed Order (i) directing AT&T to provide notice of the ordered production to its roaming partners, (ii) providing AT&T's roaming partners with five (5) business days to submit any objections to the production, and (iii) absent any such objections, requiring AT&T to produce the agreements to WCX within three (3) business days of the close of the notice period.

- *Facilities Used for Data Roaming (Interrogatory 3)*: Both in its objections and during the December 3 meet-and-confer, AT&T questioned the relevance of this request, particularly given that WCX has taken the position that there are no technical compatibility questions at issue in this case. AT&T also pointed out that this request is overbroad and AT&T sought clarification as what exact information WCX was seeking. WCX responded that, while compatibility is not in issue, WCX cannot yet discern if the Parties have a common understanding of how roaming would technically work. Further, WCX claimed that this request is relevant to the pricing dispute. As a result of these discussions, WCX agreed to reconsider this request and will either withdraw the request or resubmit the interrogatory using more precise wording describing the specific information WCX is seeking.
- *AT&T's Retail vs. Roaming Rates (Interrogatory 4)*: Both in its objections and during the December 3 meet-and-confer, AT&T noted that its retail rates are publicly available and that both Messrs. Orszag and Meadors had addressed the relationship between AT&T's retail rates and its roaming rates in their declarations. As a result of further discussions, AT&T has agreed to conduct a reasonable search of the files of its data roaming organization for responsive, non-privileged documents comparing its retail and data roaming rates.
- *Meaning of the Term "Reside" (Interrogatory 7)*: AT&T has agreed to respond to this interrogatory.
- *Difference Between Resale And Roaming (Interrogatory 8)*: Both in its objections and during the December 3 meet-and-confer, AT&T pointed out that its position regarding the differences between the concepts of roaming and resale was already extensively discussed in AT&T's answering submission, including in its Legal Analysis as well as in the Declarations of Messrs. Orszag and Meadors. WCX has agreed to reconsider this request.
- *Resale Hypothetical (Interrogatory 9)*: After discussing WCX's hypothetical regarding the impact of AT&T's proposed resale restriction on WCX's ability to provide a text-messaging application, AT&T has agreed to respond to this interrogatory.
- *AT&T Regulating Traffic (Interrogatory 11)*: AT&T objected to this interrogatory on the ground that it did not seek the discovery of facts but was a "contention interrogatory" designed to elicit AT&T's position regarding the provisions of the *Data Roaming Order* that address the serving provider's ability to limit traffic on its network. In response, WCX has indicated that this interrogatory merely seeks to have AT&T provide references to the specific contract terms that allow AT&T to "regulate traffic on its network." With that clarification, AT&T has agreed to respond to this interrogatory.

- *AT&T's Transition to Band 12 (Interrogatories 12 and 13)*: Both in its objections and during the December 3 meet-and-confer, AT&T explained that it recently provided information regarding AT&T's timetable for transitioning to Band 12 in the Commission's Interoperability Docket (Docket 12-69). In response, WCX indicated that it wished to obtain a copy of the information that AT&T filed in that docket on a confidential basis. To resolve this matter, AT&T has agreed to produce that information to WCX on a Highly Confidential basis under the Protective Order, subject to WCX's right under that Order to challenge that designation.
- *Handset Compatibility (Interrogatories 14 and 15)*: Both in its objections and during the December 3 meet-and-confer, AT&T noted that without further information on WCX's SIM cards and wireless network, AT&T could not address how WCX might adapt certain Netgear and HTC devices for use on WCX's network. In response, WCX has indicated that it would be willing to accept the explanatory narrative in AT&T's objection as an adequate answer to these requests, so long as the representations in the objection can be treated as an answer by AT&T. To avoid any confusion as to the nature of AT&T's answer, AT&T has agreed to respond to these interrogatories subject to the objections that it has interposed.

In sum, there currently are no outstanding issues regarding WCX's interrogatories to AT&T.

C. DEPOSITIONS

The Parties disagree on the need for depositions. At the December 3 meet-and-confer, AT&T indicated that it wanted to take the depositions of Mr. Feldman and Dr. Roetter, and that it was willing to make Messrs. Meadors, Orszag, and Prise available to WCX for depositions. In response, WCX indicated that it intended to oppose all depositions, but in the event the Commission decided to allow depositions, it wanted to take the depositions of Messrs. Orszag and Prise (but not Mr. Meadors) and also to seek the deposition of an AT&T corporate representative regarding AT&T's M2M business. AT&T indicated that it would oppose both WCX's opposition to all depositions as well as its request to depose a corporate representative regarding AT&T's M2M business.

The Parties' respective positions regarding the need for depositions and, if depositions are allowed, whether AT&T should be required to produce for deposition a corporate representation regarding AT&T's M2M business are set forth below.

1. WCX's Position

The default is that depositions are not used in non-accelerated docket complaint proceedings. Indeed, depositions are "seldom permitted by the Commission,"⁵⁹ and "depositions will rarely be necessary in complaint cases."⁶⁰ The general expectation is that discovery will be limited to written interrogatories. This is in contrast to accelerated docket proceedings, where written discovery is limited, but depositions are preferred.⁶¹ Rule 1.729(h) governs "additional discovery" beyond written interrogatories. Depositions "may" (or may not) be allowed as a matter of Staff discretion, depending on "the needs of a particular case and the requirements of applicable statutory deadlines." The pre-1997 rules required a showing of "good cause" before depositions would be allowed.⁶²

WCX believes that depositions should not be allowed because AT&T has not shown a real need for them. WCX did not strongly object to the substance of any of AT&T's written discovery and WCX's written discovery responses will provide give additional support for many of the WCX contentions where AT&T's answer package contended additional support was needed. AT&T could have sought more written discovery. AT&T cannot seriously contend that

⁵⁹ *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22537, ¶91 (1997).

⁶⁰ *In the Matter of Staton Holdings, Inc. d/b/a Staton Wholesale v. MCI WorldCom Communications, Inc. and Sprint Communications Company, L.P.*, Order on Reconsideration, 25 FCC Rcd 5094, 5094, ¶10 (2010).

⁶¹ *In the Matter of Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to Be Followed When Formal Complaints are Filed Against Common Carriers*, Second Report and Order, 13 FCC Rcd 17018, 17050-17053, ¶¶59-62 (1998). *See also* rule 1.729(i)(3).

⁶² *In the Matter of Amendment of Rules Governing Procedures To Be Followed Where Formal Complaints Are Filed Against Common Carriers*, Report and Order, 3 FCC Rcd 1806, 1811-1812, ¶¶45, 47 (1988).

WCX's witnesses lack sufficient "expertise" in light of the background for each of them laid out in the Second Amended Complaint and WCX's Reply package.⁶³ The topics AT&T says it wishes to address in deposition are not about "facts" but opinions AT&T will never accept. The explanation AT&T gives for its perceived need for deposition merely demonstrates that they wish to badger WCX's witnesses, run up WCX's litigation costs and extend the time it takes to resolve the case.⁶⁴ WCX is a small rural carrier with limited resources, and this case has already imposed an extraordinary burden. WCX would rather use its scarce funds investing in its home area network and providing services. Depositions of either Mr. Feldman or Dr. Roetter would serve no legitimate purpose.

But if there are to be depositions, then WCX will have no choice other than to take some of its own. AT&T has said it would make Messrs. Orszag, and Prise available, but opposes being required to make available a witness that has real expertise in M2M or IoT issues.

Meadors, Orszag and Prise do not claim any expertise with regard to the nascent M2M/IoT market, the economics of the market or the technology that will support it; in fact the "AT&T" before the Commission pretends that it is "without sufficient information as to these allegations to admit or deny them."⁶⁵ The problem is that "AT&T" knows plenty but has purposefully taken care to not involve any of its subject matter experts in this case. "AT&T"

⁶³ Dr. Roetter's experience is detailed at Second Amended Complaint pp. 158-160 and WCX Reply Package pp. 772-773. His curriculum vitae and prior submissions are listed on WCX Reply Package pp. 796-803. Mr. Feldman has over 20 years of experience, has taught Communications at the University of Texas Law School and has been accepted as an expert witness in numerous legal and regulatory proceedings. *See* Second Amended Complaint, Feldman Declaration ¶13. AT&T's real problem is that he knows too much.

⁶⁴ If depositions are allowed case processing will be extended by at least one month. The matter was filed on September 6 and we are now three months in. WCX does not have roaming, and will not until this matter is decided. Every day of delay harms WCX.

⁶⁵ None of AT&T's witnesses substantively address WCX's technical description of its services that will support M2M and IoT. They simply claim any roaming use should be banned because it is resale. Meadors Decl. ¶¶30, 40, 41. None attempt to rebut WCX's showing that this will be an "interconnected service." Ultimately, AT&T through Bendernagel Affidavit ¶¶6 and 8, claims that "AT&T lacks sufficient information."

knows that most of the “things” that will be connected to the Internet of Things and the devices doing M2M via LTE will be able to make calls to and receive calls from the traditional public switched network because LTE device addressing uses E.164 numbers, and in the United States that means NANPA numbering resources.

AT&T knows also that it too heavily relies on roaming to support M2M/IOT applications, especially in the global market. When AT&T has devices that roam outside of AT&T’s network, they connect back to AT&T’s M2M platform to obtain AT&T’s “interconnected services.” Indeed AT&T sees its M2M platform as a global network offering, and when devices travel around the globe they never lose their “AT&T” characteristics – meaning AT&T always considers itself the service provider. It matters not that the roaming devices are in England, France, Germany, Russia, China, Japan, Korea, Australia, Israel, Saudi Arabia, Brazil, Mexico, or any other country. If it is an AT&T sponsored M2M device, it’s an AT&T sponsored service. AT&T does not consider itself a free-rider when its M2M service uses roaming. AT&T does not consider itself to be engaging in resale when it supports M2M devices that are not on AT&T’s network. In these worldwide M2M applications, AT&T’s self-interest is to continue to be the M2M service provider regardless of the amount of roaming or the fact the location of the device is not within the AT&T constructed network. WCX has identified a nearly identical self-interest for launching a domestically focused M2M platform, in part through roaming on AT&T’s network. If AT&T supplies a deponent that has designed and executed with AT&T’s deployment and strategy for its current worldwide M2M offerings, the duplicity of AT&T’s position in this case in comparison to its real world strategy, business plan and actual use would become evident. That is why AT&T the Commission defendant so stridently opposes allowing WCX to depose the AT&T that knows M2M.

If depositions are to be allowed, then WCX has good cause to take the deposition of the executive director of AT&T Advanced Mobility Solutions, Mobeen Khan. WCX seeks to inquire into how AT&T uses roaming to support its own M2M services on a domestic and worldwide basis, and will inquire into what technical and business differences exist in those situations when compared to WCX's desire to roam on AT&T's network to support WCX's M2M platforms. AT&T hopes to keep the record cupboard empty with respect to M2M and then discredit WCX's assertions through legal brute force. If AT&T is allowed to attack Mr. Feldman and Dr. Roetter, then it must also allow WCX to depose AT&T on M2M to show that in fact Feldman and Roetter's views are consistent with existing AT&T real world beliefs and practices, and indeed its own roaming use.

2. AT&T's Position

As the Commission recognized in its *Data Roaming Order*, and as WCX has acknowledged both in its complaint filing and this very submission, disputes regarding commercial reasonableness are intensively factual.⁶⁶ That certainly is the case here, where Mr. Feldman has submitted four separate declarations (consisting of 113 pages of testimony and more than 50 supporting documents) and Dr. Roetter has submitted three declarations (consisting of 95 pages of testimony and more than 35 supporting documents). In their declarations, Mr. Feldman and Dr. Roetter make numerous "factual" assertions which AT&T disputes. Further, in many instances, Mr. Feldman's and Dr. Roetter's factual assertions are either unsupported or

⁶⁶ See, e.g., *id.* ¶ 68 ("The commercial reasonableness of terms offered to a particular provider may depend on numerous individualized factors[.]"); *id.* ¶ 86 (setting forth seventeen non-exhaustive, individualized factors to consider in assessing commercial reasonableness); Sec. Am. Compl. ¶ 16 ("The general consensus is that 'commercially reasonable' . . . requires a case-by-case and fact-specific inquiry . . . [and] is ultimately a question of fact.") (emphasis in original); Section III(A)(7)(b)(ii), *supra* (WCX arguing that cases such as this one are decided on a case-by-case basis, taking into consideration the totality of the circumstances) (quotations and citation omitted).

based on their experience or self-proclaimed expertise⁶⁷—which AT&T contests and would seek to probe in the depositions. In addition, there are a number of key issues which Mr. Feldman and Dr. Roetter either ignore or simply brush aside.⁶⁸ Accordingly, the Commission should exercise its broad authority over discovery and allow AT&T to take the depositions of these witnesses.⁶⁹

Moreover, there is no merit to WCX's claims that this discovery would unreasonably delay resolution of this case or impose an undue burden on WCX. While AT&T appreciates and supports the need for expedition, as can be seen from the proposed schedules set forth in the next section, the proposed depositions—to the extent that they go forward—would take less than one month to complete. Similarly misplaced are WCX's claims regarding burden. Having filed this complaint case and submitted multiple declarations from these witnesses, WCX cannot now seek to prevent necessary discovery by asserting that it would be costly. Contrary to WCX's baseless suggestion, these depositions are not being requested for purposes of “badgering” the witnesses but rather to engage in basic fact-finding.

AT&T does, however, object to WCX's request to depose an AT&T corporate representative regarding AT&T's M2M business.⁷⁰ AT&T's M2M business is not at issue in this

⁶⁷ See, e.g., Feldman Decl. ¶ 16 (asserting that “AT&T sees no benefit from a relationship with WCX, so it will not offer an agreement that could be practically used by WCX”); Feldman Supp. Decl. ¶ 6 (contending, without evidentiary support, that “[i]n order to be sustainable, charges for significant use of roaming must not exceed AT&T's retail rates”); Feldman Reply Decl. (Reply at 60) (providing no basis for statement that WCX cannot charge customers for roaming); Roetter Conf. Decl. (Comp. at 194) (claiming that “WCX will operate at a loss if AT&T's proposed roaming prices are used”); Roetter Reply Decl. (Reply at 773) (alleging that AT&T's proposed terms would “[g]enerate losses for WCX”).

⁶⁸ See, e.g., Feldman Reply Decl. at 16-63 (providing dozens of pages of testimony on general business concepts and discussions without describing WCX's actual business plans); Roetter Reply Decl. at 6 (summarily dismissing Orszag's “free-riding” analysis).

⁶⁹ See 47 C.F.R. § 1.729(h) (“[t]he Commission may allow . . . depositions”). While the Commission's rules do not provide for depositions as a matter of right, *see id.*, the Commission has permitted depositions in numerous cases. See, e.g., *AT&T v. YMax Commc'ns Corp.*, File No. EB-10-MD-005 (Dec. 22, 2010); *AT&T v. All Am. Tel. Co.*, File No. EB-09-MD-010 (July 28, 2010). In addition, the fact that the Commission's pre-1997 rules may have required good cause for depositions is irrelevant because those rules no longer are in effect.

⁷⁰ Although WCX initially indicated during the December 3 meet-and-confer that it would seek to depose an AT&T corporate representative, WCX has shifted positions and has now indicated that—in the event the Commission

proceeding. As AT&T has made clear both in its discussions with WCX as well as in its answering submission, AT&T has no objection to WCX participating in the M2M business or offering M2M services that utilize roaming (even nationwide roaming) subject to reasonable usage restrictions. Rather, AT&T objects to WCX's proposal to build that business via AT&T's network by converting the Parties' data roaming agreement into a "backdoor" resale agreement through provisions which allow virtually unlimited data roaming.⁷¹ That, in AT&T's view, is not an appropriate use of data roaming under the Commission's *Data Roaming Order*.⁷²

But more significantly, a deposition of an AT&T corporate representative regarding AT&T's M2M business has nothing to do with the issue of WCX's ability under the Commission's data roaming rules to use AT&T's network to build WCX's M2M business. In this connection, it is noteworthy that WCX did not use any of its allotted interrogatories to inquire about AT&T's M2M business. Further, when pressed during the December 3 meet-and-confer as to the relevance of this deposition, WCX indicated that one of the purposes was to demonstrate that AT&T's M2M business was subject to the Commission's automatic roaming rules. While AT&T generally disputes the applicability of the automatic roaming rules to its provision of data roaming services,⁷³ that dispute has absolutely nothing to do with whether or not AT&T's M2M business is subject to those rules. In fact, WCX did not make that argument either in its complaint or reply submissions.

Finally, WCX seeks to justify its proposed deposition on the ground that AT&T utilizes roaming to provide international M2M services. AT&T's international services are

permits depositions—WCX would seek to depose an executive of AT&T Advanced Mobility Solutions.

⁷¹ See, e.g., Meadors Decl. ¶¶ 30, 41.

⁷² See, e.g., *id.* ¶ 41.

⁷³ See Legal Analysis § III(A).

irrelevant to this case—which is about *domestic* roaming—and are offered under a wholly different regulatory regime.⁷⁴

In sum, AT&T requests that the Commission allow depositions of the Parties' declarants but deny WCX's request that AT&T make available a corporate representative to discuss AT&T's M2M business—a topic that has no relevance to the matters properly at issue in this proceeding.

IV. SCHEDULING

In the event the Commission allows depositions, the Parties agree the following schedule would be appropriate:

- Pre-hearing conference with Staff: to be scheduled in early January 2015
- Completion of written discovery: to be completed by late January/early February 2015
- Completion of depositions: to be completed in February 2015
- Initial closing briefs: to be submitted in mid-March 2015
- Reply closing briefs: to be submitted in late March/early April 2015

If the Commission does not allow depositions, the Parties agree that initial closing briefs should be submitted in mid February 2015, and reply closing briefs should be submitted in early March 2015. The Parties further agree that the Commission should establish a date, at least seven business days after the completion of the pre-hearing conference, for the Parties to submit final settlement proposals.

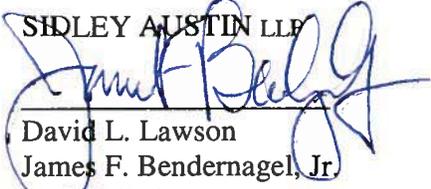
V. RECORDING OF STATUS CONFERENCE

The Parties have agreed that it is not necessary to record the January pre-hearing conference.

⁷⁴ See Orszag Decl. ¶ 70 n.106 (explaining that foreign regulatory schemes are irrelevant to this case).

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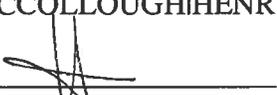
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