

**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 OF STIPULATED FACTS,
DISPUTED FACTS AND KEY LEGAL ISSUES**

AT&T Mobility LLC (“AT&T”) and Worldcall Interconnect, Inc. (“WCX”) (together, the “Parties”) in accordance with the Federal Communications Commission’s (the “Commission”) October 9, 2014 Scheduling Order and the Commission’s rules, 47 C.F.R. §§ 1.732(h) and 1.733(b)(1)(v), hereby submit this Joint Statement of Stipulated Facts, Disputed Facts and Key Legal Issues.

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I. STIPULATED FACTS

The Parties have defined “Stipulated Facts” as facts on which the Parties agree, but the inclusion of any fact as a stipulated fact does not constitute an admission by either Party that the fact is relevant or material to the legal issues in dispute in this case. The Parties have stipulated to these facts for purposes of this proceeding only.

A. BACKGROUND

1. Complainant Worldcall Interconnect, Inc., a/k/a Evolve Broadband (“WCX”), is a Texas corporation headquartered at 1250 South Capital of Texas Highway, Bldg. 2-235, West Lake Hills, TX 78746.

2. WCX is an affiliate of Worldcall, Inc., a telecommunications services and investment holding company formed in April 2004.

3. WCX offers wireless services in certain portions of Texas using its licensed 700MHz frequencies. WCX holds a lower B Block 700MHz license covering Cellular Market Area (“CMA”) 667. This CMA is adjacent to the CMAs covering Austin, Houston, and San Antonio, Texas, where AT&T has deployed 4G Long Term Evolution (“LTE”) service.

4. WCX’s licensed area contains 11,000 square miles and has a population of less than 400,000 people. It contains all or part of the following counties: Austin, Bastrop, Burleson, Caldwell, Colorado, Fayette, Gonzales, Jackson, Lavaca, Lee, Matagorda, Washington, and Wharton. Much of WCX’s licensed area is “rural” under most accepted understandings of that term.

5. WCX has installed network facilities and is currently offering wireless broadband internet access service using LTE and Band 17. WCX asserts that its network currently covers approximately 35% of CMA 667.

6. A portion of the population in CMA 667 commutes from within WCX's licensed area to locations outside CMA 667 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.

7. 2010 U.S. Census data shows that the base population of Bastrop County for 2010 was 77,783; that approximately 21.5% of the population (over 15,000 people) spends the day in locations outside Bastrop County; and that 59.3% of the "workers" in Bastrop County do a daily commute.

8. The residents of CMA 667 may choose to purchase wireless service from multiple providers. Nationwide wireless providers such as AT&T, Verizon, T-Mobile and Sprint all offer wireless services within CMA 667. A number of smaller fixed wireless providers such as Texas Broadband, Inc., and Ranch Wireless, Inc., also serve communities, farms, and ranches in CMA 667.

9. The population centers surrounding CMA 667 (*i.e.*, Houston, San Antonio, and Austin) are covered by the networks of a number of wireless providers, with AT&T, Verizon, Sprint, and T-Mobile all offering LTE service in these three cities.

10. Current data from the federal government indicate that 100% of the populations of Houston, San Antonio, and Austin are covered by high-speed wireless networks with download speeds exceeding 10 MB/second.

11. WCX's principal, Lowell Feldman, and certain companies affiliated with WCX have been litigants in intercarrier disputes at the Commission, in the courts, and before state public utility commissions.

12. Mr. Feldman previously was the CEO of UTEX Communications Corp. (d/b/a Feature Group IP) (“UTEX”), which was subject to an approximately \$3 million award in favor of AT&T flowing from a regulatory interpretation of an interconnection agreement UTEX had adopted, and pertaining to disputed access charges for VoIP traffic. UTEX filed for chapter 11 bankruptcy protection in March 2010. UTEX’s chapter 11 bankruptcy case was converted to a chapter 7 liquidation, and the company ceased operations in December 2013.

13. AT&T is a limited liability company organized under the laws of Delaware. AT&T is headquartered at 1025 Lenox Park Blvd., Atlanta, Georgia 30319.

14. AT&T has multiple Radio Station Authorizations, including in CMAs adjacent to WCX’s licensed area. AT&T has licenses for—and offers 4G LTE services in—Austin, Houston, and San Antonio, Texas.

15. WCX proposes to use AT&T’s wireless network for roaming radio access outside of WCX’s licensed area.

16. AT&T is a member of the GSM Association (“GSMA”). GSMA is the association of providers that employ the Global System for Mobile Communications (“GSM”) standard, including those implementing LTE. The GSMA represents the interests of mobile operators worldwide. Spanning more than 220 countries, the GSMA unites nearly 800 of the world’s mobile operators with 250 companies in the broader mobile ecosystem, including handset and device makers, software companies, equipment providers and Internet companies, as well as organizations in industry sectors such as financial services, healthcare, media, transport, and utilities.

17. Many customers today purchase wireless services with the expectation that such services will be provided nationwide (and perhaps worldwide).

18. The market for wireless services is rapidly evolving. Mobile telephony was previously voice-centric, but users are now demanding access to advanced services like messaging, applications, and broadband Internet access. Other services—such as Machine-to-Machine (“M2M”) and “Internet of Things” services—are also being rapidly developed and deployed.

19. WCX desires to be the network provider for M2M services to its customers via roaming on AT&T’s wireless network.

20. M2M and Internet of Things projects often involve multiple connected devices per each user or company.

21. Some M2M applications and ideas hold proprietary technology and applications developed by non-carrier industry participants.

22. The mobile sector is anticipating rapid growth in M2M applications and services delivered over mobile networks.

23. Several operators surveyed in 2014 by the GSMA highlighted that the M2M market is moving from a period of market development towards a commercial-deployment phase, and that the operators have restructured their M2M business activities over the last year to reflect the “strategic importance” of M2M to their organizations.

24. Some M2M services could involve mobile devices.

25. The GSMA has anticipated and developed a mechanism to accommodate a market environment that enables M2M product suppliers to produce solutions that work with multiple operators for the sake of convenience, flexibility, and economies of scale. For some devices or pieces of equipment such as anti-theft modules in cars, utility meters, personal or

property tracking devices, or security modules, the Subscriber Identification Module (“SIM”) card has to be inserted in the machine and hermetically sealed during the manufacturing process.

26. In the traditional mobile telephony market the mobile operator usually purchases SIM cards in bulk, installs its credentials on them, and then inserts these cards into the mobile phones.

27. At the time M2M devices are manufactured, the mobile operator that will be operating the M2M service may not be known. The mobile industry through the GSMA has produced the “Embedded SIM” specification to enable remote “over-the-air” provisioning and management of SIMs in M2M devices. This solution is designed to enable all operators to participate conveniently in—and thereby speed adoption of—M2M services in order to open up opportunities for new services and applications.

28. AT&T is operating and providing services in the M2M market, and has identified M2M services and applications as part of its business plans and as providing value to its customers.

29. New M2M services and capabilities have the potential to dramatically affect the agricultural, environmental, medical, educational, and shipping industries, among others.

30. Voice over LTE (“VoLTE”) is a new and developing standard that incorporates the advancements of Voice over Internet Protocol into a managed LTE data network.

31. WCX asserts that it currently provides “interconnected” voice and data and text messaging. WCX alleges that it supports these interconnected services using LTE and broadband and that it does not employ a separate narrowband channel. AT&T does not dispute these claims.

32. If a WCX user is roaming on AT&T's network, AT&T may not be aware that WCX's user is employing an "interconnected" service.

B. THE PARTIES' NEGOTIATIONS

33. The Parties have long understood that there are two main issues in their negotiations over a potential data roaming agreement: roaming rates and usage restrictions. The Parties' discussions in 2011-12 and 2014 focused on those two issues.

34. Good faith is not an issue in contention.

1. The Parties' Initial Negotiations in 2011-12

35. On June 1, 2011, shortly after the *Data Roaming Order* was released, WCX contacted AT&T to request an LTE data roaming agreement, and the Parties initiated negotiations.

36. WCX has no roaming agreements with any other provider.

37. At the time WCX initially requested to enter into negotiations, WCX had not yet constructed its network and did not provide services to any customers.

38. During late June and early July 2011, the Parties engaged in technical discussions and later executed a nondisclosure agreement.

39. On July 20, 2011, AT&T provided to WCX a draft data roaming agreement pursuant to which each Party would have the right—but not the obligation—to roam on the other Party's network.

40. AT&T informed WCX at the time that it did not anticipate roaming on WCX's network. AT&T has the right to make the business decision not to roam on WCX's network.

41. WCX did not provide an alternative data roaming agreement during the Parties' negotiations in 2011 or propose specific modifications to AT&T's proposed agreement.

42. A major sticking point in the Parties' 2011 negotiations was the Parties' divergent views on roaming rates, with WCX proposing the "prevailing retail rate" and AT&T proposing to use a rate for data roaming services consistent with the rates in AT&T's data roaming agreements with other wireless providers.

43. Having reached an impasse, on October 11, 2011, the Parties sought the assistance of the Commission in attempting to negotiate a data roaming agreement. As part of that process, WCX stipulated that AT&T had been negotiating in good faith but that the Parties nevertheless had been unable to reach an agreement.

44. The Parties made submissions to the Commission setting forth their respective positions, participated in a full-day negotiating session with Commission Staff (in December 2011), and engaged in further discussions, but did not reach an agreement.

45. On May 2, 2012, WCX sought to file a complaint under the Accelerated Docket rules, which request AT&T opposed on several grounds.

46. By written notice dated May 24, 2012, Commission Staff denied WCX's request to file a complaint on the Accelerated Docket.

2. The Parties' Renewed Negotiations in 2014

47. On June 24, 2014, WCX contacted AT&T to restart the Parties' negotiations. WCX provided AT&T with a copy of the then-current RWA Model Agreement, which WCX suggested should serve as the basis of the Parties' negotiations. WCX also told AT&T that WCX had built out its network to the Commission's build-out requirements and had retail customers. WCX also asked if AT&T had changed its positions on any of the "impasse issues" from the 2011-12 negotiations, and WCX noted that it stood ready to call on the Commission to resolve the Parties' impasse.

48. On July 2, 2014, AT&T responded to WCX's June 24, 2014 email, stating that it appeared that disagreements remained between the Parties on the two main issues—*i.e.*, usage restrictions and roaming rates. AT&T further noted that its proposed roaming rates were based on arm's-length, negotiated rates that AT&T was paying to its domestic roaming partners and that such rates thus were commercially reasonable. AT&T also took the position in its email to WCX that roaming should be limited to an incidental portion of a customer's use, but AT&T stated that it welcomed negotiations with WCX to reach a commercially-reasonable agreement.

49. The same impasse issues—roaming rates and usage restrictions—that divided the parties in 2011-12 continued to divide the parties in 2014.

50. On July 29, 2014, AT&T provided its proposed data roaming agreement to WCX, and noted that the roaming rates set forth in the AT&T proposal were significantly below the average rates AT&T was paying pursuant to its data roaming agreements with other wireless providers, and asked WCX to provide feedback on the proposed agreement. A copy of AT&T's proposal is attached as Exhibit 5 to the Declaration of Gram Meadors.

51. WCX did not provide written comments on the AT&T proposal. Rather, it took the position that the RWA Model Agreement should serve as the basis of the Parties' negotiations.

52. On August 5, 2014, WCX sent AT&T a Notice of Intent to File Formal Complaint and Offer to Discuss Possibility of Settlement (the "Formal Complaint Notice"). Pursuant to the Formal Complaint Notice, WCX notified AT&T that, absent a negotiated solution, WCX intended to file a formal complaint with the Commission. A copy of this letter is attached to WCX's Complaint Submission as Document No. 8A.

53. On August 8, 2014, counsel for AT&T sent a letter to counsel for WCX responding to the Formal Complaint Notice. A copy of this letter is attached to WCX's Complaint Submission as Document Number 7. Further correspondence regarding WCX's Formal Complaint Notice was exchanged on August 11 and August 14. Copies of that correspondence are attached to WCX's Complaint Submission as Document No. 5A and 6.

54. On August 15, 2014, WCX delivered an updated version of the RWA Model Agreement to AT&T. AT&T did not provide specific written comment on the WCX proposal.

55. On August 19, 2014, the Parties held a teleconference to discuss their disputes, but it quickly became apparent that an agreement would not be reached on the two principal sticking points (*i.e.*, roaming rates and usage restrictions).

56. On August 20, 2014, WCX provided AT&T with a further revised draft of the RWA Model Agreement but explained that none of the changes in the revised draft were in line with AT&T's positions on the Parties' disputes, and that WCX was preparing to file a formal complaint. A copy of the RWA Model Agreement that WCX has proposed in this proceeding is attached as Exhibit I to the initial Declaration of Lowell Feldman.

57. On August 25, 2014, AT&T informed WCX that AT&T remained ready and willing to provide data roaming to WCX at commercially-reasonable rates and terms.

58. On September 8, 2014, WCX filed its initial Complaint.

C. AT&T'S PROPOSED DATA ROAMING AGREEMENT

1. General

59. The AT&T proposal allows, but does not obligate, either party to roam on the other's network.

CONFIDENTIAL] If the usage exceeds those restrictions, AT&T can [BEGIN
CONFIDENTIAL] [REDACTED]

[END CONFIDENTIAL]

4. Other Provisions

a. Audit Rights (Section 11(c))

65. Section 11(c) of the AT&T proposal provides that [BEGIN CONFIDENTIAL]

[REDACTED]
[REDACTED]

[END CONFIDENTIAL]

66. Under Section 11(c) of the AT&T proposal, [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] [END CONFIDENTIAL]

b. Suspension and Termination (Sections 17 and 20)

67. Under Sections 17(a) and (c) of the AT&T proposal, [BEGIN
CONFIDENTIAL] [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [END CONFIDENTIAL]

68. Section 17(b) of the AT&T proposal [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] [END CONFIDENTIAL]

69. Section 20 of the AT&T proposal provides that [BEGIN CONFIDENTIAL]

[REDACTED]
[REDACTED]
[REDACTED] [END
CONFIDENTIAL]

70. Under the suspension provision in the AT&T proposal, [BEGIN
CONFIDENTIAL] [REDACTED]
[REDACTED] [END
CONFIDENTIAL]

c. Binding Arbitration (Section 23(b))

71. Section 23(b) of the AT&T proposal provides [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] [END CONFIDENTIAL]

72. Section 23(b) of the AT&T proposal states that [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [END CONFIDENTIAL]

d. Limits of Liability (Section 24)

73. Section 24 of the AT&T proposal [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL]

74. The specific terms of this provision were not discussed during the Parties' negotiations.

e. Network Monitoring (No Provision Cited)

75. The AT&T proposal [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL]

76. AT&T's proposal references its data privacy policy, which applies to all customers on its network.

f. Term of Agreement/Termination Rights

77. Section 2 of the AT&T proposal provides [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL]

D. WCX'S PROPOSED DATA ROAMING AGREEMENT

78. WCX has proposed to use the RWA Model Agreement as the roaming contract terms between AT&T and WCX.

79. The RWA Model Agreement was developed by the RWA's Roaming Committee under the chairmanship of WCX's CEO Mr. Feldman. It was formally adopted and

approved by the Committee in late June 2014. It has since been revised and likely will continue to undergo revisions.

1. Usage Restrictions

80. The RWA agreement allows the home carrier to resell its services to MNVOs, and specifically addresses and authorizes “Machine-to-Machine” (“M2M”) services.

81. The RWA Model Agreement does not contain any absolute volumetric limit on usage. It does state that “[t]he Parties acknowledge and agree that the LTE Data Roaming authorized under this Agreement serves as a supplement to the mobile Data Services each Party offers on its own Network and that each Party will endeavor to provide the majority of its customers’ mobile data services on its own [n]etwork.”

82. RWA Section 5 states, in pertinent part:

“The Parties further acknowledge and agree that neither Party may limit or condition Authorized Users’ Data Roaming in any manner that prohibits or diminishes the ability of either Party to: (1) provide M2M and/or Internet of Things services; (2) act as a wholesaler of Data Services or provide access to Data Services to resellers; or (3) establish MVNO relationships. Further, neither Party may require or precondition any network build-out or any other network or launch requirement that exceeds in any way any build-out requirement established by the FCC.”

2. Roaming Rates

83. The RWA Model Agreement proposes a roaming rate of \$0.0096/MB, subject to downward adjustment if prevailing retail rates decrease.

3. Other Provisions

a. Audit Rights

84. WCX has not proposed audit terms.

b. Suspension and Termination

85. The conditions under which one Party can suspend services are set forth in Section 12 (Suspension of Services) of the RWA Model Agreement, which allows only the “Home Carrier” to suspend service to all of its “Authorized Users.”

86. Under Section 12 of the RWA Model Agreement, AT&T’s ability to suspend service to WCX users would be limited to instances such as defective or illegal equipment, technical problems, and fraudulent or unauthorized use.

87. Section 12 of the RWA Model Agreement provides that “the Parties will continue to provide all services and honor all other commitments under this Agreement, including, without limitation, making payments in accordance with this Agreement while a dispute is being resolved under the procedures governed by Section 17. A Serving Carrier may not suspend Data Services or cancel this Agreement based on claims that have been submitted to formal or informal Dispute Resolution pursuant to Section 17.”

c. Binding Arbitration

88. The RWA Model Agreement permits commercial arbitration if private negotiations fail. However, the RWA Model Agreement permits a party to seek “interlocutory or permanent relief, including damages, from a court of proper jurisdiction or from the Federal Communications Commission in order to enforce this Agreement, to assert that the other Party has violated the Communications Act or any other state or federal law, an FCC rule or any other administrative rule, or to prevent serious and irreparable injury to the Party.”

89. The RWA Model Agreement that WCX sent to AT&T on June 24, 2014, provided for mandatory arbitration under the American Arbitration Association rules. The subsequent versions of the RWA Model Agreement revised that provision to permit, but not require, arbitration.

d. Limits of Liability

90. The RWA Model Agreement contains a provision limiting “proven damage or loss,” excluding “consequential damage or loss,” to \$1 million.

e. Network Monitoring

91. WCX proposes that there be no “service awareness” capability associated with roaming by WCX’s customers. WCX’s proposed terms provide for no packet inspection or throttling by AT&T, other than application-neutral network management while cell site locations are congested in a manner that does not differentiate between WCX’s use and AT&T retail use. Nor do WCX’s proposed terms permit additional charges or changes in service based on the types of applications or uses by WCX’s customers.

92. RWA Section 5 also provides:

“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.”

f. Term of Agreement/Termination Rights

93. The RWA Model Agreement provides that the agreement shall continue “in perpetuity” (Section 2) unless modified and subject to each Party’s termination rights (Section 13), under which each Party would be able unilaterally to terminate the agreement if (i) the other

Party is in material breach for 90 days or more, (ii) the continued provision of service is “technically impracticable,” or (iii) there is an “unacceptable level” of unauthorized use that neither Party can remedy.

II. DISPUTED FACTS

The Parties have defined “Disputed Facts” as facts (i) on which the Parties cannot agree or (ii) for which a Party states that it does not have sufficient supporting information to allow for a stipulation. In cases where a fact is disputed due to a lack of sufficient supporting information, the Parties reserve the right to agree to further stipulation upon the receipt of additional information.

A. WCX’S DISPUTED FACTS

Preface: In order to have some semblance of readability many of the following WCX proposed findings address only commercial reasonableness and do not specifically speak to the automatic roaming “just and reasonable” standard. Since the legal test for “just and reasonable” is higher than that for commercial reasonableness if a particular contract provision is not commercially reasonable then it is necessarily also not just and reasonable.

1. WCX’s Services

1. WCX’s home area covers several research facilities associated with major universities, but is not metropolitan by any means.

2. Given the small footprint and relatively low population of CMA 667, WCX cannot by itself build out a ubiquitous nationwide network and provide ubiquitous coverage for M2M and “Internet of Things” devices and applications.

3. Since AT&T controls the only ubiquitous LTE network compatible with WCX technology, significant roaming use is essential for WCX to enter and compete in this market and

provide service to consumers and businesses that reside in, or conduct significant activities within, WCX's licensed area.

4. The services at issue in this case are inherently mobile, and WCX has a limited and rural geographic area.

5. WCX will most likely support different data usage patterns and volumes, because WCX's users come from predominately rural areas. They need and expect nationwide coverage, but they do different things, and use their wireless service in different ways, than urban denizens.

6. WCX currently provides wireless broadband Internet access service.

7. WCX currently also provides "interconnected" voice and data and text messaging. WCX supports these "interconnected" services using LTE and broadband. WCX does not employ a separate narrowband channel.

8. "Mobile" service is inherently mobile and users expect to be able to fully use the service wherever they may be. If users engage in significant use when they or the device is outside the provider's home area, then it is still roaming, and is not resale.

9. When AT&T's LTE network supports use of WCX's interconnected voice and data and text-messaging services, AT&T will see only "data." AT&T will not be aware that WCX's user is employing an interconnected service.

10. WCX's 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.

11. AT&T's LTE network utilizes an in-network switching facility that enables AT&T to reuse frequencies and accomplish seamless hand-offs.

12. Under the recent "text to 911" decision, WCX will have additional duties, including geolocation responsibilities, for WCX's text service. Further, WCX has new obligations to "over the top" ("OTT"), "interconnected" text providers in that WCX must now form a provider-customer relationship with the text provider allowing "use of the wireless device's native SMS application programming interface (API) after recognizing that the user is sending a text message to the text short code '911' and also "route over the CMRS network."

13. The new text to 911 rules require WCX to allow "interconnected" text providers to make use of WCX's network and WCX must allow access to wireless device APIs. This constitutes "resale" if one applies AT&T's theory and definition.

14. WCX intends to enter more extensive (covering more than 911) arrangements with OTT application providers for basic text-messaging and other innovative applications and services that will in some instances require "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."

15. WCX also intends to partner with others to develop and provide specialized applications and services specifically targeted to rural users.

16. WCX is solely LTE-based, so its options are presently limited to LTE networks using compatible technology and frequencies.

17. WCX and AT&T are technologically compatible and there are no generational differences. The parties did not raise any technical feasibility issues. Therefore there are no disputed issues under rule 20.12(e)(ii)-(v).

18. AT&T is the only other potential roaming supplier that is currently technically compatible on a nationwide basis with WCX.

19. AT&T's decision not to roam on WCX's network functionally turns any potential agreement into a one-way arrangement whereby WCX purchases roaming from AT&T. Thus the arrangement will differ from historical reciprocal arrangements where the providers both roam on each other's network and compensate the other for roughly equal amounts of roaming.

20. While AT&T has the right to make this business decision, this choice has important consequences to the commercial reasonableness of each party's proffered terms.

21. The WCX Evolved Packet Core is in place, fourteen radio sites are installed and operational, and WCX is currently providing retail service from ten of them. WCX also has seven additional enodeB units in its staging area.

22. WCX has surpassed the Commission's build-out requirements as outlined in Auction 73.

23. WCX's ability to viably provide continued and additional retail services to more customers is tied directly to its ability to obtain commercially-reasonable roaming, and thus further expansion will occur on a slower schedule—or not at all—until WCX can obtain commercially-reasonable roaming terms.

24. WCX has also secured tentative arrangements to provide innovative services to and in cooperation with several technology-intensive businesses and other advanced technology customers, but those are wholly contingent on having commercially reasonable and economically sustainable roaming terms with AT&T.

25. Due to AT&T's decision to not roam on WCX's network WCX will be only a home carrier and AT&T will exclusively serve as serving carrier, relegating the relationship to asymmetrical or one-way operation. This is the result of AT&T's unilateral choice.

26. If customer consumption can only occur within the WCX footprint, WCX is too small to entice application and device developers and manufacturers to collaboratively create new, exciting services and applications.

27. If WCX can offer innovative services to WCX residents that work nationwide, and can help other small providers also deploy similar services to their own users while they are at home or while roaming, then WCX can materially advance competition and innovation and have an impact that extends far outside of its footprint.

28. WCX has already exceeded the FCC's build out requirements in its licensed home service area. Therefore, WCX has already sufficiently invested in its home area network to date. WCX has sufficiently proven it intends to continue to invest if it obtains reasonable roaming terms.

29. WCX's core network will control service delivery for all services, and only AT&T's transmission network capabilities will be used by WCX.

30. WCX's M2M services will involve WCX-hosted applications that communicate with devices located in WCX's home area and devices connecting to AT&T's network.

31. The "interconnected services" that WCX will offer include VoLTE (voice over LTE), messaging and M2M services.

32. Without roaming terms that are financially, practically, and operationally sustainable, WCX will be unfairly impeded from implementing a competitively-viable business plan.

33. In a national wireless market, WCX does not have a viable business absent a national roaming agreement.

34. WCX cannot create a viable business on home-area-only services offered to such a small population as that of CMA 667, with only marginal revenues (to ensure only marginal losses) from communications outside that area.

35. WCX is only requesting roaming outside the area where it has any possibility or responsibility to invest.

36. WCX is highly unlikely to be able to significantly invest either inside or outside its home area if it is blocked from developing a viable business as a result of not having reasonable roaming terms, conditions, and prices.

37. Over the past two years, WCX has made significant progress in the marketplace with unique M2M concepts and with paving the way to develop and deploy solutions based on those concepts.

38. WCX plans to provide smartphone services in which its voice and texting capabilities are integrated into a broadband-capable smartphone or tablet.

39. Over 1,000 census blocks within CMA 667 currently do not have broadband.

40. WCX began to build out its network in 2012 in areas it felt were without adequate services, including Dale, Texas, and Wallis, Texas.

41. WCX's primary value to its customers today is that of a broadband provider. The majority of its current customers use WCX's LTE service as their primary means to connect to the Internet.

42. WCX has developed and deployed VoLTE capabilities consistent with the GSMA standards. Approximately 75% of WCX's customers subscribe to a VoLTE and data bundle, with the remaining 25% of customers subscribing to just data.

43. In October 2014, WCX's customers averaged 26/GB per user of data use.

44. If WCX is prohibited from having any roaming capability, it cannot invest in smartphone technology because a regionally limited cell service is not competitive in today's marketplace.

45. WCX estimates that 20%-50% of its customers' total use will be associated with roaming.

2. Key Aspects of Roaming

46. The differing legal standards applicable to roaming for interconnected services and roaming for non-interconnected "data" services do not fully account for the fact that small, rural providers without extensive home area footprints throughout the nation must have the ability to support their users when they travel about and want to enjoy the full suite of capabilities within their wireless service, for both non-interconnected broadband data and interconnected voice and data capabilities.

47. The problem with differing legal standards for roaming is compounded when (like WCX) the small rural provider uses new technology that offers "interconnected" voice and data services (including push-to-talk and/or text-messaging) via broadband LTE rather than over legacy, narrowband methods.

48. Any provider that wishes to innovate in the emerging markets of M2M and "Internet of Things" must also have access to support their customers throughout the nation.

49. Roaming is imperative, an absolute prerequisite to a small, rural provider's ability to attract and retain customers at all. The Commission so recognized in the Data

Roaming Order, ¶15. WCX must obtain reasonable roaming terms in order to have a viable home area service.

50. Roaming terms, conditions, and prices must be sustainable—notwithstanding the legal fictions or niceties involved—and a small, rural provider must be in position to offer service on terms that are comparable to those offered by the larger nationwide providers.

51. A provider that wants to support innovative services must not be subject to prohibitive and expensive terms and conditions imposed by the underlying roaming agreement. The terms, conditions, and prices must allow the rural provider to support its innovative and cutting-edge services on a nationwide basis.

52. A small, rural provider must be able to offer a full suite, all-coverage service to technology developers that want to use wireless-based M2M or “Internet of Things” capabilities for mobile stations and devices wherever they may be—inside the home area or not.

53. A main driver for most of the new and innovative services is the relatively newfound ability of independent “non-carrier” technology companies to program, design, and build hardware and software into devices which have some element of “openness” to them. For example, the “mobile app” (short for “application software”) currently dominates the vibrant marketplace. The mobile app market is thriving because Google and Apple allow independent and small developer communities to participate, and because a “hit” app will be ubiquitously available throughout the nation and most of the world.

54. If the available “market” for the “mobile app” (which is but one example of the “Internet of Things”) was exclusively limited to the home area of a single small, rural provider, then the rural provider would not be a viable market participant.

55. New applications focusing on rural needs will be stifled without rural-provider participation in the M2M and or mobile app market.

56. Large, incumbent providers have the incentive to slow technological advancement and throttle applications or services that they do not control, and cannot successfully rent-seek or otherwise directly monetize other than from the revenue garnered from incremental broadband usage.

57. Application and device developers reasonably (i) assume an open and flexible nationwide (and worldwide) environment for their product and its method of collecting, processing, and using data, (ii) assume the capability or device can be used in a ubiquitous fashion and on any underlying transmission network, and (iii) often will have a cost per month, per device, measured in pennies or a fraction of pennies.

58. A new carrier or a carrier seeking to deliver the maximum value to customers through capacity available on additional frequencies in a geographically-limited license it has acquired faces a significant barrier to entry, or a significant reduction in the value of this frequency to its business and to its customers, if in either case the carrier cannot offer national coverage via roaming services that use the same frequencies and technology as in its own spectrum footprint.

59. A carrier with only limited geographic coverage and that does not have access to reasonable roaming agreements that cover the rest of the country will be unable to offer national service to customers, and will be unable to compete.

60. Smaller wireless providers can only offer national coverage if they have access to national roaming services in areas outside their own spectrum footprints.

61. Unless small rural carriers can obtain roaming on reasonable terms, conditions, and prices, they will find it difficult to obtain all the funding they need for network and other investments since due diligence by lenders and other sources of funds will reveal that their business plans or models are not viable absent such access to national coverage via roaming.

62. High roaming prices can severely harm or even destroy the viability of a rural carrier's business model, thereby discouraging network investments and the development and provision of new and improved services designed to meet the specific needs of rural communities.

63. It is not competitively feasible in today's wireless market for a carrier to charge customers for roaming. This is a change from the market practice of only a few years ago.

64. To be competitive, a carrier must offer nationwide, domestic roaming that has no additional incremental fee, or in the case of mobile applications, M2M, and "Internet of Things," is no more than the prevailing retail rate for in-home usage. This means that the home carrier must absorb the cost of roaming charges imposed by other carriers if those charges exceed the incremental cost of supplying usage on the home network.

3. Roaming Price

65. WCX's proposed price guarantees AT&T a prevailing retail price for use of AT&T's network when a WCX user roams on the AT&T Network, which means AT&T will in fact earn more profits from WCX roaming than AT&T obtains from its own retail customers.

66. AT&T's proposed roaming agreement would generate losses for WCX from roaming traffic priced at a wholesale roaming rate many times higher than the retail price WCX can charge its customers in a competitive market.

67. High AT&T prices will preclude WCX entry and impose threats to its viability.

68. If WCX has to pay a wholesale rate of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] for any roaming traffic that its customers generate, but can only charge them \$15/GB at retail in order to be competitive, WCX inevitably will lose money on all its roaming traffic, and will do so at an alarming rate.

69. Losses will be staggering because WCX is a small rural wireless operator with very limited coverage, and its users travel out of area widely and often. They rightly expect to have seamless connectivity nationwide, and they will obviously use it.

70. Other competitive providers have been forced in certain cases to limit or cap roaming because of the exorbitant rates charged by home providers.

71. The roaming price proposed by AT&T of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] is not in the mutual interest of both Parties because WCX will inevitably incur prohibitive losses.

72. AT&T's roaming rate is not consistent with international benchmarks.

4. AT&T's Proposed Roaming Agreement

73. AT&T's proposed agreement is so commercially unreasonable it cannot be used as even the starting point for a contested set of contract terms.

74. The AT&T template is embedded with explicit and implicit commercially-unreasonable results and vague provisions that allow AT&T unconstrained discretion to unilaterally interpret the terms in ways harmful to WCX by "finding" hidden meaning and intent.

75. AT&T's contract template cannot be adequately edited to remove all of the commercially unreasonable provisions.

76. AT&T's proposal (i) effectively bars WCX's market entry as a provider of roaming-capable M2M or "Internet of Things" devices and services, (ii) prevents WCX from providing mobile service to residential or business customers residing in WCX's licensed area

when they commute to work locations or schools located in AT&T's licensed area, [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL]

77. The result of AT&T's terms, if adopted, is that unless a provider already has a ubiquitous network, the provider may not participate in new markets and services as an innovator and users from rural areas must use a national provider such as AT&T rather than a home-based provider with ties to their community.

78. AT&T has the incentive to make its smaller competitors less attractive to customers by reducing those customers' ability to roam if they do not sign on as AT&T retail customers.

79. Were it not for Section 20.12 of the Commission's rules requiring it to provide roaming, AT&T would have no reason to offer roaming to WCX, and has the incentive to deny roaming on any terms, much less on reasonable terms.

80. WCX expert Dr. Martyn Roetter reviews WCX's proposed contract and AT&T's proposed contract to assess the extent to which each proposal adheres to the policies put forth by the Commission in the Commission's Roaming Rule and the Data Roaming Order are persuasive.

81. AT&T's restrictions are primarily located in Section 11 of its proposed terms. The entire section is set out here to aid in a complete understanding:

[BEGIN CONFIDENTIAL] [REDACTED]

[END CONFIDENTIAL]

82. The subsection 11(a) limitation saying that [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [END CONFIDENTIAL] may be related to roaming is arbitrary and has no reasonable justification.

83. In order to avoid a breach, WCX would have to find ways to limit its customers' use so that in the aggregate more than [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of WCX's service was provided in-home and on-net.

84. One problem WCX would face under AT&T's terms is that the current retail market no longer allows for retail-based, additional charges when customers are roaming. Throttling of throughput and usage caps are unavailable as well.

85. Many of WCX's rural customers spend more than [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of their time away from the home area while at work or in school or commuting between the rural WCX home areas and the urban area where AT&T has LTE coverage.

86. 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 [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] roaming.

87. WCX would also face practical difficulties trying to avoid a breach or the penalty rate. Assume WCX had an Account with four Authorized Roamers (e.g., one billing account, with four users or devices), say an employee or a family member. If the employee or family member uses the device during a vacation, while in the hospital or while attending

college, AT&T [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[END CONFIDENTIAL]

88. The definition of “Permanent Roamer” is also very indefinite. What does

[BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[END

CONFIDENTIAL] The result could be devastating to WCX.

89. AT&T’s terms would, as a practical matter, 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. A parent would not buy WCX’s service for use by college-bound family members, or spouses who 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.

90. The AT&T terms [BEGIN CONFIDENTIAL] [REDACTED]

[END CONFIDENTIAL] however. AT&T may deem an arrangement with an application service provider whereby WCX allows the application to be installed in devices, access certain APIs and where necessary rely on the data capabilities to be “resale.”

91. WCX has testified that it intends to form provider-customer relationships with over the top (OTT) text-messaging providers that allow use of the wireless device’s native SMS

application programming interface (API) and routing over the CMRS network. That would likely be an “interconnected” text-messaging arrangement, but AT&T might consider that to be a [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL].

92. WCX has obligations under the Commission’s “text to 911” decision to establish a provider-customer relationship with “over the top (OTT)” “interconnected” text providers⁶³ allowing “use of the wireless device’s native SMS application programming interface (API) after recognizing that the user is sending a text message to the text short code ‘911’ and also ‘route over the CMRS network.’” OTT text providers will not necessarily be located in WCX’s licensed service area. Hence, under AT&T’s proposed terms WCX would be prohibited from offering services to them as out-of-area customers and would therefore be unable to comply with its duties under the “text to 911” decision.

93. WCX addressed the potential situation where it partners with a third party provider that has developed a rural-centric application and service. The example was cattle-monitoring devices with an embedded SIM. WCX explained that even if the third party (which would be WCX’s customer) “resides” in WCX’s home area, the cattle herd may not.

94. AT&T’s proposed terms do not clarify whether WCX’s example would constitute prohibited “resale.” Nor is it clear whether any out-of-home-area cows are “Permanent Roamers” because they are “Authorized Roamers” associated with some “Account.” It is not possible to discern the result if the farm house is in WCX’s area, but a large portion of the farm is in AT&T’s area, and the cows happen to prefer the grass in the AT&T part. In other words, AT&T’s proposed terms are unclear with regard to where the cows would “reside” and if they would be “Permanent Roamers.”

95. AT&T's terms leave unresolved a number of potential issues and questions. WCX would not know in advance precisely what uses and amounts are allowed, prohibited, or subject to the penalty rate. The terms would have to be interpreted on an *ex post* basis, if AT&T chose to declare a material breach or impose the penalty rate. The uncertainty, vagueness, and potential overbreadth of AT&T's proposed terms would hinder WCX's ability to compete, innovate, and provide new services because of the risk WCX would face in any number of scenarios and potential interpretations of the contract terms.

96. AT&T's proposed terms effectively and wrongly punish WCX for the fact that it is a small, rural provider with a limited and contiguous geographic licensed area. The usage restrictions are not necessary to incent further investment. To the extent AT&T is attempting to overrule the Commission's specific determinations of the appropriate level of build-out that is necessary in the home area and impose more rigorous in-home build-out requirements, such terms are commercially unreasonable and are unlawful since they represent a prohibited collateral attack on the Commission's build-out rules.

97. The business relationship between WCX and M2M or Internet of Things applications and devices may or may not resemble that between AT&T and Amazon. AT&T may treat some of WCX's activities as "resale"-oriented and some of WCX's business partners as MVNOs. To the extent AT&T's terms restrict "resale" and to the extent that restriction operates to prevent WCX from supporting innovative uses, services, applications, and devices, they are commercially unreasonable, unjust, unreasonable, and unreasonably discriminatory.

98. AT&T's terms would treat the relationship between WCX and "interconnected" text providers as "resale" and therefore prevent WCX and its interconnected text providers from complying with the recent "text to 911" rules, or from partnering to support other interconnected

data or text-messaging services, they are commercially unreasonable, unjust, unreasonable, and unreasonably discriminatory.

99. AT&T's terms either prohibit resale, M2M, and Internet of Things or are vague and ambiguous, which means AT&T could later say they are prohibited even though their terms may not expressly so provide. Other vague terms may later be read to inhibit or prohibit other uses while roaming. Resale prohibitions, restrictions on M2M or Internet of Things or any other use that is privately beneficial but not publicly detrimental are commercially unreasonable, unjust, unreasonable and unreasonably discriminatory.

100. AT&T's interpretation of the term "commercially reasonable" is inconsistent and is not based on the particular circumstances in this case.

101. AT&T acknowledges that to be reasonable an agreement must be in the mutual self-interest of both parties but its proposed roaming terms are damaging to the legitimate competitive self-interest of WCX and would benefit only AT&T.

102. AT&T's proposal necessarily leads to an outcome where only AT&T's self-interest is served, and AT&T expects WCX to masochistically accept a complete subjection to AT&T's interest while not meeting its own interests in any way.

103. AT&T did not offer a roaming rate to WCX based on the specific considerations of the particular spectrum, topography, existing and planned build-out, population density, volume of data used, credit risk posed by the roaming partner, customer demographics, or any other specific circumstances unique to WCX.

5. Machine-to-Machine Services, Internet of Things, and Resale

104. One non-carrier industry participant which has a favored relationship with AT&T is Amazon, which has developed and deployed specialized devices and applications on specialty phones and tablets.

105. AT&T considers Amazon to be an MVNO.

106. WCX can and should be able to support and grow its own type of MVNOs by working with them directly in a similar manner to how AT&T has historically worked with Amazon and others.

107. The marketing and sales material and messages of the national facilities-based providers and the smaller facilities-based providers with geographically limited spectrum footprints, along with MVNO resellers, demonstrate that the relevant geographic market is nationwide.

108. Major vertical M2M market opportunities identified include automotive (relatively short-term) and health care (medium- to long-term).

109. The geographic scope for wireless service in general and the emerging M2M service market in particular is national.

110. If WCX must strictly limit M2M communications because of restrictions on the proportion of total traffic, or caps on number of M2M devices in relation to all devices or generally in terms of the time they can spend in a roaming mode, then WCX will be excluded from participating in M2M opportunities.

111. If WCX is excluded from the M2M market it will lose the incentive to support initiatives aimed at introducing innovative M2M capabilities that may be overlooked by large national carriers, as exemplified by an M2M service targeting rural areas in particular. A good example of a rural M2M application is automated monitoring of the lactation cycle of cows so as to reduce the proportion of missed insemination times. Research has shown that farmers can reduce missed insemination episodes from 50% to 10% using M2M. Cows tend to wander about, and will not know if they have crossed some imaginary boundary or a device they are

carrying goes out of WCX's coverage and into AT&T's coverage. They tend to move in groups, so a lot of devices would do the same thing. Cows cannot be trained to stay within a given provider's in-home, facilities-based area.

112. AT&T is not interested in supporting rural-focused services.

113. AT&T's retail preferences should not prevent rural providers from offering M2M services that will benefit farmers and other rural users and hence society in general.

114. Recent announcements by Iridium produce additional evidence for the growth of M2M services and applications and the wide area coverage that customers are looking for and need. Iridium reported commercial M2M data ARPU of \$17 in the second quarter of 2014. It also recorded an 18% growth year-on-year in commercial M2M subscribers.

115. A small rural provider's business model can reasonably include a growing role for M2M services and applications.

116. Roaming terms that effectively prevent a small rural provider from participating in the M2M market are commercially unreasonable.

117. It is not commercially reasonable to classify new technology uses for M2M and Internet of Things as prohibited "Permanent Roamers."

118. Terms and conditions that would prohibit WCX from innovating in ways that allow LTE data to become a significant facilitator for connecting devices and delivering services are not commercially reasonable.

119. Data-use restrictions that prevent WCX from serving as an attractive host provider partner for these developing technology markets are not commercially reasonable.

120. There should be no limitations to any individual account or the number of and types of devices associated with any individual account. M2M and "Internet of Things" services

and applications should never be considered part of a prohibited or punished “Permanent Roamer” pool.

121. Roaming terms and conditions should allow and encourage innovative uses that may or may not track the patterns of AT&T’s users or AT&T’s system-wide usage patterns.

122. It is commercially unreasonable to dis-incent developers of new technologies and uses from partnering with WCX when WCX desires to enable innovation by opening up its network, work with developers, and promote new uses of technology, even if AT&T chooses not to do so.

123. WCX’s plans and proposals may result in one or more cultivated customers that independently develop technology and desire to be their own MVNO – much like Amazon has become a valuable MVNO partner of AT&T. WCX should be allowed to be the host carrier of newly cultivated MVNOs, even if out of home area roaming is involved.

124. WCX will not obtain numbers from AT&T but will use its own numbers.

125. WCX will not buy “minutes” from AT&T.

126. WCX will have its own devices, its own SIM cards and all communications will be controlled by WCX’s core, not AT&T’s core.

127. AT&T will, for the most part, provide only transport after authentication is made via the WCX core.

128. AT&T will merely route data traffic to the interconnection point between WCX and AT&T.

129. WCX will be a network provider, even in the roaming context. WCX will be using its own SIMS, its own numbers, its own LTE/3GPP (Third Generation Partnership Project)

Core, and will have developed interfaces and solutions with its M2M customers so that they can communicate and/or control devices nationwide via industry accepted protocols.

130. AT&T's only involvement will be that of mere radio access transport, and often in very small amounts. Put another way, AT&T will be used for interconnected service roaming and nothing more.

131. Research firms project that in the United States there will be 10 connected devices for each person in the future.

132. WCX intends to focus its M2M services on new technologies and concepts that have not been customized for a specific industry application.

133. Present M2M connectivity and use lags behind its potential because the needed collaboration and solutions have not yet been fully devised.

134. AT&T's terms prohibit M2M services through prohibitively-expensive rates and terms that bar using roaming at all to support M2M uses, which makes M2M not a viable business strategy for WCX and threatens investment in WCX's own core, LTE market areas.

135. WCX will provide each of the following cellular functions: SIM or Universal SIM supplied and controlled by WCX; all 3GPP functions; interfaces for the 3GPP standard Packet Gateway; and interworking to the M2M service platform.

136. WCX's proposed architecture and use is 100% compliant with 3GPP and M2M worldwide standards. AT&T's is not. 3GPP and M2M standards bodies intend to (and assume) that the host provider will be content with the receipt of a reasonable payment for the use of whatever network resources are consumed. In great contrast to AT&T's proposal, these standards do not design in use restrictions and device limitations.

137. WCX will use roaming as an input to its M2M solutions. When a WCX-hosted M2M solution requires connectivity through AT&T, WCX will authenticate that use and will allow the device to roam.

138. WCX and its customers want to compete with AT&T to serve M2M functions and use interconnected roaming to simply connect devices, users, M2M applications, and services.

139. AT&T's decision not to follow the technical industry standards for roaming, especially specific to M2M authentication and security where the home network is allowed to control its User Equipment ("UE") in a visited network through GBA (Generic Bootstrapping Architecture), is an attempt by AT&T to foreclose WCX from the M2M market that eliminates WCX's ability to distribute new and better M2M solutions.

140. The technical and policy use restrictions that AT&T demands prevent use of a 3GPP GBA as contemplated by the roaming standards set for 3GPP and which are necessary for M2M to work.

141. Potential investors will significantly devalue the investment value of WCX due to an inability to use roaming in conjunction with supporting M2M platforms and services.

6. The Parties' Negotiations

142. AT&T has used its dominant position as a provider of nationwide roaming capabilities to strong-arm small carriers into executing data roaming arrangements containing commercially unreasonable terms.

143. 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.

144. AT&T has little incentive to negotiate fair or reasonable roaming rates.

145. There is substantial asymmetry of information in the negotiations between AT&T and WCX and between AT&T and any much smaller wireless operator.

146. Because WCX's business is crucially dependent on obtaining a roaming agreement with national coverage, but AT&T's is not, there is an imbalance of power between the parties when negotiating.

147. WCX offered to provide roaming to AT&T within WCX's home area, on symmetric terms, conditions and prices, including WCX's proposed data roaming price.

148. WCX spent two years and significant capital, and has now completed much of its build-out.

149. AT&T's July 29, 2014 terms mirror in all material respects the terms it had provided in negotiations two years earlier.

150. WCX reasonably determined that further settlement discussions would be fruitless.

7. WCX's Proposed Roaming Agreement

151. The RWA terms WCX has proposed to use in this case are commercially reasonable.

152. The RWA Model Agreement relies on the current best practices of the GSMA for Billing, Settlement, Physical Interconnection, and Technical Testing and proposes to use the Current GSMA Appendices in whole during implementation.

153. WCX expert Dr. Martyn Roetter reviews WCX's proposed contract and AT&T's proposed contract to assess the extent to which each proposal adheres to the policies put forth by the Commission in the Commission's Roaming Rule and the Data Roaming Order are persuasive.

154. WCX's proposed terms are commercially reasonable.

155. WCX's proposed terms are just, reasonable, and not unreasonably discriminatory.

156. The RWA built a consensus among dozens of operators on standard terms and conditions including limitation of liability, notice, term of agreement among other things.

157. RWA has committed to engage in industry best practices and to mature its terms in an open and public and transparent manner. Thus, when and if problems are found in the RWA Model Agreement, they can be quickly addressed and fixed.

158. WCX's proposed terms are permissive of market entry and competition, and indeed necessary for market entry of a new local or regional wireless carrier, or for these carriers' efficient exploitation of a spectrum license in a new band, so as to support the policy of stimulating competition in the U.S. wireless market.

159. WCX's proposed terms do not impose any material constraints on the ability of the serving national provider to provide service to its own customers and to compete.

160. WCX's proposed terms would allow a reasonable profit margin on the roaming AT&T will supply to WCX.

161. WCX's proposed terms include safeguards against arbitrage by the home carrier on its use of roaming by requiring that the home carrier directly handle the majority of its customers' traffic.

162. WCX's proposed terms prevent either Party from abrogating the operation of the roaming agreement at their sole discretion in ways that lead to unjustifiable, harmful, and potentially irreparable consequences for the other Party.

163. WCX's proposed terms are consistent with the terms and conditions in roaming agreements between other operators that have been found to be mutually satisfactory.

164. WCX's proposed terms would all WCX and other carriers to offer more traditional mobile service as well as new M2M services, as part of the necessary national coverage.

165. WCX's proposed terms support and contribute to the goal of ensuring that small carriers can compete and innovate fairly on their own merits, and that the licenses they hold will be exploited to deliver the maximum possible value to customers.

166. WCX's proposed terms will stimulate investment in and growth of rural broadband networks and services.

167. WCX's proposed terms do not impose any restraints on AT&T's freedom of action other than those included in the Commission's Data Roaming Order.

168. WCX's proposed terms would apply to both participants in a symmetrical roaming agreement. The agreement's terms and conditions are symmetrical with respect to the rules and obligations under which the participating carriers will operate, except where their required actions are a function of their distinctive respective roles as Home and/or Serving Carrier.

169. WCX's proposed terms do not contain any commercially-unreasonable limitations on the actions or prerogatives of either Party that may have an inappropriate competitive effect or negative influence on consumers' freedom of choice regarding their provider of mobile services.

170. WCX's proposed terms adopt and incorporate the standards and procedures of the GSMA.

171. WCX's proposed terms are standards-based and implement accepted industry practices.

172. WCX's proposed terms do not unduly burden AT&T, either technically or financially.

173. WCX's terms do not contain implicit or explicit terms that require WCX to meet AT&T Mobility's notions of an appropriate level of home area build out to the extent they exceed the FCC's determinations on that issue.

174. WCX's terms do not contain implicit or explicit functional requirements that WCX build out in areas where it does not have licensed spectrum.

175. WCX has proposed 50% as the maximum acceptable amount of out of home area roaming use merely for compromise purposes. This is a compromise-based bright dividing line between acceptable "roaming" consumption and unacceptable roaming consumption. WCX proposes to restrict roaming usage to no more than 50% of the total data usage of all WCX accounts.

176. AT&T's proposed terms would effectively prohibit WCX from having M2M and Internet of Things relationships.

177. AT&T's proposed terms prevent WCX from being able to achieve the kind of status that would attract an Amazon.

178. AT&T's terms are anticompetitive because they erect an insurmountable barrier to entry.

179. By providing commercially-reasonable terms and conditions to small providers, the RWA Model Agreement enables WCX and other providers to offer both more traditional mobile as well as new M2M services with national coverage. The RWA Model Agreement therefore supports and contributes to the goal of ensuring that small providers can compete and

innovate fairly on their own merits, and that the licenses they hold will be exploited to deliver the maximum possible value to customers.

180. WCX's proposed roaming agreement terms ensure that WCX's roaming traffic will be profitable for AT&T, and there will be no constraints on AT&T's freedom of action regarding activities that are permitted within limits defined by law and regulation.

181. The RWA Model Agreement implements the 3GPP standards with respect to roaming. AT&T refuses to use 3GPP and M2M industry standards.

182. The RWA Model Agreement does not constrain AT&T's freedom of action with respect to actions, behavior, or business practices that do not violate law or regulation.

183. The RWA Model Agreement limits roaming use to 50% of total use (ensuring WCX is always the primary provider).

184. WCX is seeking an arrangement for which it will pay a price that is profitable to AT&T whereby WCX's customers, when they are located in areas covered by AT&T's network outside CMA 667, will have access to the services WCX offers and to which they subscribe.]

185. The price proposed by WCX to AT&T meets the legitimate interests of both Parties.

186. WCX proposed a roaming rate that is comparable to retail rates it has identified, and on the basis of evidence that is available exceeds the costs that AT&T will incur in carrying its roaming traffic.

187. Even with the WCX proposed rate of \$10 per GB, WCX has every incentive to reduce roaming use in order to achieve a better gross margin.

188. If the roaming rates are very high, as AT&T proposes, even a miniscule amount of roaming would eliminate WCX's gross margin under the effective rate caps imposed by the Commission and Texas PUC for data and voice rates.

8. WCX seeks roaming from AT&T, not resale.

189. One of the principal issues between the parties is whether there is some spot on a continuum beyond which "roaming" becomes "resale." AT&T's position is that roaming should be wholly incidental to a facility-based provider's services, and virtually all usage should be consumed on the provider's own network rather than through roaming.

190. WCX agrees that "roaming" should not be confused or conflated with "resale" and concurs with the FCC's efforts to instill proper incentives for carriers to invest in their own home networks.

191. WCX asserts, and we find, that out-of-area roaming is not resale as a practical matter and as a matter of law. They are two distinctly different things.

192. The "roaming" principles articulated by the Commission do not authorize an inflexible prohibition of, or punishment for, out-of-home-area roaming usage merely because it is significant. No purpose is served by imposing punishing rates or terms for significant roaming usage if the provider has fully met all Commission build-out requirements for its licensed area and commits to further investments in that licensed area, but has only a limited geographic licensed spectral authorization footprint that is predominantly rural.

193. An increase from 50% roaming to 51% roaming does not magically transmute into "resale." To the contrary, even greater than 90% roaming would not be resale given that the technical arrangement between the parties is entirely different from the technical means by which resale is conducted.

194. WCX's proposed compromise to cap roaming is made in an effort to satisfy the Commission's caution that providers should not "rely on roaming arrangements in place of network deployment as the primary source of their service provision." See Data Roaming Order ¶ 21 even though WCX does not agree that roaming that exceeds 50% necessarily means the provider is using out of home area roaming as the "primary source" of service provision. WCX purposefully set the 50% value lower than could easily be justifiable given the legal meaning of "primary."

195. While WCX has sufficiently invested to date and has shown it will continue to invest in its licensed area, it is commercially unreasonable to punish WCX if WCX's customers use their service while on the move and they happen to be outside of WCX's licensed area in any significant measure.

196. It is commercially reasonable for WCX and its users to have significant roaming usage associated with WCX service.

197. "Significant" roaming is not "resale." If WCX helps innovate the M2M market in agriculture, shipping, or the medical field, it should be able to support its cultivated customers through roaming, and should not be forced to pay AT&T more than full retail rates when the WCX cultivated innovation succeeds nationwide.

198. AT&T asserts that roaming should only be "incidental" and wants to limit the amount that would be allowed before there is a breach or AT&T can impose a penalty rate.

199. AT&T claims that more than de minimis roaming usage is "resale."

200. AT&T's proposed terms contemplate only "incidental" roaming usage. AT&T's demonstrated intent is to construe "incidental" to mean "occasional" or "minor" in volume and instance. This usage is inconsistent with the legal definition of "incidental": "depending upon or

appertaining to something else as primary.” 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.”

201. 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 fixed wireless service was an authorized “incidental service” – and thus still CMRS – when it was “auxiliary” to the “primary” mobile service.

202. WCX’s intent and proposed terms contemplate a direct network connection to AT&T consistent with how the GSMA Appendices currently support such roaming arrangements. As a result, AT&T should send all traffic from WCX authenticated roamers to WCX’s network, allowing WCX to manage and provide services to WCX’s customers. This may involve WCX managed applications such as VoLTE, interconnected data, text-messaging, machine-to-machine or Internet of Things applications, or it may simply be Internet access. This technical fact, that service will be provided by WCX while roaming is occurring, makes data roaming distinct from any type of resale.

203. WCX’s proposals therefore independently show that its desire is for “roaming” and not “resale.” Resale occurs when a provider obtains an entire finished (bundled) product from a vendor, and then “resells” that same finished (bundled) product to an end-use customer, either with or without adding value, for profit. “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”

204. WCX’s proposal does not involve buying “minutes” from AT&T, with AT&T providing the underlying telecommunications functionality in a manner almost indistinguishable from its own retail service. In the CMRS realm, MVNOs are resellers because they purchase “airtime” and then resell it under their own brand. WCX, however, is not proposing to “resell” AT&T “finished” data offerings. Instead, only a portion of AT&T’s capabilities would be used, specifically joint authentication, use of spectrum associated radio equipment and some measure of transport, and then the communications will be handed off to WCX for management, processing, delivery of service applications and direction. AT&T will not be providing the “Service” be it M2M, voice, texting or Internet for WCX customers; that will be WCX’s job.

205. WCX is already offering data and other service in its home area using its own spectrum and facilities. The Commission has expressly recognized that when a provider is self-providing in the home area, then “roaming” cannot be equated to “resale.”

206. A provider cannot be “incented” to “invest” in a network outside its home area and in places where the provider has no licenses.

207. The principle concerning investment incentives can only apply within the home licensed area—where there will be little to no roaming in WCX’s case.

208. WCX has already exceeded the FCC’s build-out requirements. WCX has therefore already invested in its network. WCX has proven it will continue to do so if can obtain reasonable roaming terms.

209. Artificially-low amounts of allowed roaming cannot be justified in WCX's case based on the principle that usage restrictions are necessary to incent WCX to further invest in its own network facilities.

210. No purpose is served by punishing roaming use outside of WCX's licensed home area based on the "investment incentive" principle.

9. Roaming Price

211. The parties are very far apart on price terms.

212. The current prevailing retail rate of \$0.0096 per megabyte (MB), or approximately \$10 per gigabyte (GB) of data is currently a commercially reasonable data roaming rate, for all usage. The \$10 per GB represents the RWA's estimate of industry-average and AT&T's prevailing retail rate for consumption. WCX argues that the price should be commensurately reduced as retail rates go down.

213. In 2007 the Commission refused to benchmark roaming rates and prevailing retail rates. It did so based on a lack of a persuasive showing in the record of that proceeding that consumers would be harmed in the absence of caps or benchmarks and because of concerns that benchmarking or capping could reduce investment incentives or perhaps even raise prices for "regional" calling.

214. The Public Roetter Declaration demonstrates that roaming prices exceeding the prevailing retail data rate is harming and will harm rural consumers. Roetter shows that "the state of competition in the intermediate product market is such as to warrant" a benchmark or relationship between prevailing retail rates and data roaming prices. Therefore, *in this case*, WCX has supplied the evidence that was missing from 2007.

215. The Public Roetter Declaration also explains and demonstrates that high out of home area roaming prices reduce investment incentives and opportunities with regard to home area networks.

216. The Public Roetter Declaration also shows that the marketplace has changed since 2007. Competitive pressures require nationwide plans, without separate or additional charges for roaming usage. Thus, a small rural provider cannot feasibly charge a “regional” price, much less raise it. This means that high roaming charges necessarily raise the retail price small rural providers must charge of *all* usage, including “regional” consumption. In other words, high roaming charges result in higher prices for “local” or “regional” consumption.

217. Rural consumers are being harmed by high roaming prices. Roaming prices that are several multiples above the prevailing retail rate reduce competition, limit available services, and put rural customers at a severe disadvantage in comparison to their urban counterparts.

218. AT&T’s proposed base price is [BEGIN CONFIDENTIAL] [REDACTED]
[END CONFIDENTIAL]. AT&T also wants to impose a penalty price of [BEGIN
CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED] [END CONFIDENTIAL]

219. Under AT&T’s proposed terms, if a WCX 10 GB monthly subscriber roamed [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED] [END CONFIDENTIAL] in roaming charges, yet WCX’s total revenue from that customer would be less than \$70.

220. The Roetter Public Declaration shows that retail prices for data consumption are declining.

221. Roetter estimates that the prevailing domestic retail data price during the summer of 2014 ranged between a low of \$3 per GB and a high of \$10 per GB.

222. Roetter also showed, based on information published by the Canadian Radiotelevision and Telecommunications Commission, that Canadian retail prices during August 2014 were between \$4.14 - \$7.6 per GB.

223. Roetter estimated that the prevailing retail data price in Europe was between \$2 \$4 per GB in August, 2014.

224. We find these estimates to be reasonably accurate.

225. The Roetter Public Declaration reasonably proved that if the roaming price is set at the prevailing retail rate then AT&T will earn a higher profit from roaming than it does from retail data service. This is so because the costs associated with roaming are lower than the costs associated with providing retail service.

10. Usage Limitations

226. AT&T's roaming maxima are artificially low for total customer usage and individual accounts. These limits unreasonably punish small rural carriers with limited coverage areas, constitute a barrier to entry, and restrict small carriers' ability to offer innovative services involving M2M and Internet of Things capabilities requiring broad dispersion of devices. In particular, they prevent carriers with relatively small or isolated licensed areas from serving large accounts and/or support innovative uses that require mobile wireless capability.

227. [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL]

229. WCX must fulfill at least 50% of its users' data needs through means other than roaming on AT&T's network. This compromise-based offer and proposed term supplies an easy to administer rule for acceptable roaming volume, so disputes should be few. Nonetheless, disputes do arise from time to time, and dispute resolution terms in agreements are often very important.

230. WCX seeks roaming to sell service to customers that reside, conduct business or have a physical presence in the WCX's home area, but need seamless connectivity for when they or the device is not in the home area.

231. Any limits that largely restrict WCX to its home CMA will prevent market entry.

232. WCX's roaming will not entail the purchase of or even the use of AT&T's bundled and finished retail wireless products.

233. Given the small number of residents in CMA 667 relative to AT&T's existing customer base, WCX's customers would not materially impact the total traffic carried over AT&T's network.

11. Dispute Resolution Provisions

234. The Commission: (i) has the authority to approve or reject any roaming agreement implemented under its Data Roaming Order; (ii) is a neutral body that is authorized to uphold and foster fair and reasonable practices by mobile services providers; and (iii) possesses sector-specific technical and other expertise. The Commission is the most competent body to determine whether one (or both) of the parties to a roaming agreement have acted or behaved in such a way as to violate its conditions, the Act, or a rule, and then if a breach or violation is found to determine what the consequences should be based on the damage that these violations

may have caused and to whom. Preserving Commission involvement and oversight under appropriate circumstances is an imperative.

235. To the extent that AT&T's terms would operate to prevent any Commission oversight or ability to weigh in on a dispute over roaming on a going-forward basis, then they unreasonably frustrate the Commission's goals and policies, and would unlawfully restrict the Commission's jurisdiction over interstate communications by wire. Any terms that commit post-agreement dispute resolution exclusively to some forum other than the Commission, and preclude Commission oversight, are unlawful and commercially unreasonable. In particular, if one party has violated the Act or a Commission rule in the context of a roaming arrangement, then full recourse to the Commission cannot lawfully be imposed over the objection of a party.

236. Involuntarily-imposed terms that strip the Commission and/or the courts of their lawful jurisdiction in favor of private dispute resolution or some kind of binding commercial arbitration are commercially unreasonable. Parties are free to voluntarily agree on a case-by-case basis to employ private dispute resolution, but they cannot be compelled to do so as a general matter through contract terms to which they do not assent.

237. [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED] [END
CONFIDENTIAL] This is a commercially-unreasonable result. This would be particularly so if
AT&T's basis for termination was eventually found to be unjustified. WCX would suffer
irreparable harm, [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED] [END CONFIDENTIAL]

A substantial proportion of WCX's customers would leave. WCX would likely not survive the experience.

238. Because of its limitation on liability provision, if AT&T was later found to have wrongly claimed breach and chose to terminate roaming capability WCX could not recover its reasonably foreseeable actual and otherwise recoverable damages. AT&T would have the incentive to suspend early and often because it would never suffer any consequence for doing so, even when WCX had done absolutely nothing wrong. Allowing AT&T to suspend or terminate during a dispute is unreasonable and unconscionable.

12. Audit Provisions

239. AT&T has proposed audit terms to [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL]

240. AT&T's terms contain [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL]

241. AT&T's terms are vague and ambiguous. They would allow AT&T to unreasonably interpret and apply the limitations by manipulation of the underlying information

in order to find a “violation.” The omission of necessary specificity and advance guidance on data collection and retention renders AT&T’s terms commercially unreasonable.

13. Network Management and Surveillance of WCX Users’ Communications

242. The parties disagree whether AT&T Mobility should have the right to surveil, monitor and manage WCX users’ traffic while they are roaming. WCX’s proposed terms contemplate a direct network connection to AT&T Mobility, so that AT&T Mobility can send all traffic from WCX authenticated roamers to WCX’s network, allowing WCX to manage and provide services to WCX’s customers. This may involve WCX managed applications such as VoLTE, text-messaging, machine-to-machine or Internet of Things applications, or it may simply be Internet access.

243. AT&T’s proffered roaming agreement is silent on the question of its network and traffic management practices as it may apply them to roaming traffic on its network. AT&T’s terms are also unclear with regard to whether it will inspect the content of the communications sent to or received from WCX’s customers or attempt to discern the applications or services WCX users employ when they are roaming on AT&T’s network.

244. It would be commercially unreasonable for AT&T to inspect the content of WCX users’ communications while they are roaming on AT&T’s network. Content inspection would unreasonably and unnecessarily violate users’ privacy and could vitiate any legal privileges (such as attorney-client, priest-penitent, spousal, medical, or trade-secret) that would otherwise apply to the communication. Further, content inspection by AT&T would violate WCX users’ property rights in terms of the right to exclude others and to exclusively retain the full benefit and value of their property.

245. To the extent AT&T's proposed terms would allow it the discretion to discern the application being used, or the content being sent/received, by WCX users and then act on that information to assign less favorable treatment than AT&T would assign to its own retail customers, AT&T's terms are commercially unreasonable.

246. Both Parties are proposing a rate for "data" that does not vary depending on use. AT&T therefore has no reason to know or try to know what the datagrams represent.

247. To the extent AT&T is proposing that it should be able to surveil or monitor the content or application employed by WCX's users, or the specific use they are putting to their wireless service, AT&T's terms are commercially unreasonable, unjust, unreasonable, and unreasonably discriminatory.

14. AT&T's Roaming Agreements with Third Parties

248. Neither WCX nor the Commission can independently assess whether AT&T's characterizations or descriptions of its other roaming agreements are correct.

249. It is unclear to what extent the weighted-average roaming rate cited by AT&T includes rates that involve older and more expensive technologies than LTE.

250. It is unclear to what extent the weighted-average roaming rate cited by AT&T includes rates that were set some time ago but are still in force, and are therefore not relevant to a roaming rate to be established today, since as AT&T itself points out these rates have been declining very rapidly (para. 10, p. 3 of Answer).

251. It is unclear whether any of the roaming agreements included in AT&T's analysis involve a roaming partner in circumstances that are reasonably comparable to those of WCX, *i.e.*, a license in a single CMA with comparable demographics to CMA 667 and obliged to deploy LTE in Band Class 17.

252. It is unclear whether any of the roaming agreements included in AT&T's analysis involve a roaming partner that has only 700 MHz spectrum, is entirely LTE, and is presently tied to Band 17.

253. AT&T's roaming partners, including operators that can afford to devote much greater resources to roaming negotiations than WCX, are far from being satisfied that the data roaming agreements that they have been able to establish so far are "commercially reasonable."

254. Indeed, many of the companies listed on Tab 8, beginning with Document No. 150 and ending with Document 228, are among the most vocal AT&T antagonists in Docket 05-265.

255. Smaller carriers have had little choice but to accept unfavorable data roaming terms from essential roaming partners like AT&T in order to offer a competitive service to customers.

256. The presumption of reasonableness of roaming agreements applies to existing terms that are subsequently challenged. Terms negotiated in prior years involving third parties do not establish a presumption of reasonableness prospectively and for all others, otherwise such terms would become perpetual and apply even when they are no longer reasonable.

15. Automatic Roaming for WCX's Interconnected Services

257. WCX's VoLTE, messaging and M2M services all rely on North American Numbering Plan (NANP) resources (telephone numbers). The applicable standards for each of them expressly require and use telephone numbers for addressing and routing.

258. Each of WCX's VoLTE, messaging, and M2M services is a real-time, two-way, switched voice or data service.

259. WCX' VoLTE, messaging, and M2M services are (or will be) interconnected with the public switched network and utilize an in-network switching facility that enables the provider to re-use frequencies and accomplish seamless hand-offs of subscriber calls.

260. Each of WCX's VoLTE, messaging, and M2M services is (or will be) interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider and do or will give subscribers the capability to communicate to or receive communication from all other users on the public switched network or provide general access to points on the public switched network.

261. WCX provides a VoLTE-based voice service that is real-time, two-way and switched. It uses regular phone numbers and can both send and receive calls from the rest of the public switched network.

16. WCX Has No LTE Roaming Alternatives to AT&T

262. The wholesale roaming market is uncompetitive.

263. The only reasonable or practical potential partners for roaming are the four national carriers AT&T, Verizon, Sprint and T-Mobile.

264. As a 700 MHz Lower Band B licensee, WCX has had no choice but to implement Band Class 17 until now for its LTE deployment.

265. AT&T was the only practical compatible alternative for WCX to obtain significant wide-area LTE coverage outside of CMA 667.

266. The impact of Band 17 is still reverberating throughout the U.S. mobile market. WCX was directly affected since it had no alternative but to deploy Band 17 in its 700 MHz license in CMA 667.

267. WCX had difficulty finding useable devices that would acceptably work on Band 17 because AT&T controlled the device market to the point that devices would not properly function when another carrier used Band 17.

268. WCX will have the opportunity to implement Band 12 when the software feature MFBI (multi-frequency band indicator) becomes available.

269. There is not, at present, a viable Band 12 ecosystem.

270. WCX is dependent on AT&T's implementation progress on Band 12.

271. If WCX were to move to Band 12 today, there are no devices it could use because there is not yet an adequate ecosystem for them.

272. WCX had extraordinary difficulty finding devices it could use on even Band 17, and that problem continues to exist to this day.

273. There is not yet an ecosystem for Band 12, and there are very few, if any, devices WCX could use even if it did take AT&T's advice that it abandon its sunk investment in Band 17 and immediately commit scarce capital and other resources to an investment in Band 12.

274. One of the most popular, recently-launched mobile devices—the iPhone 6 and 6 Plus—does not, as of late 2014, support LTE in Band 12. It does support LTE in Band 17.

275. With consumers' expectation that wireless services must be available on a nationwide basis, AT&T and Verizon have become essential roaming partners for virtually all competitive carriers.

276. Realistic alternative providers will arrive sometime in the future, but they are not yet here, nor are they just around the corner.

277. Given Verizon's deployment of LTE in Band Class 13 and more recently AWS, it can resist meeting WCX's request for roaming on the grounds that WCX's network is not compatible with its LTE deployments. Therefore the prospect of entering into roaming negotiations with Verizon as an alternative to AT&T is not one that is has been or would be sensible for WCX to entertain.

278. It does not make economic sense for a small provider such as WCX to divide its roaming traffic among roaming partners, which necessarily would necessarily increase its total roaming-related costs.

279. The theoretical but still ephemeral existence of alternative (and less well suited to WCX's circumstances) roaming partners to AT&T does not absolve AT&T from the obligation to respond to a legitimate data roaming request from WCX and to propose and accept commercially reasonable terms.

280. AT&T and Verizon dominate the U.S. M2M market and they have driver control over the available component hardware and available operating systems.

281. To date the hardware and OS vendors and the collaborative software community have coalesced around the AT&T and Verizon ecosystem for M2M. This means they presently design everything assuming it will be on the AT&T network or the Verizon network.

282. Because AT&T is the only established network for M2M in Band 17, WCX is prevented from providing viable M2M services without an AT&T roaming agreement that permits M2M.

283. WCX has already deployed its network as Band 17. In order to do M2M with another carrier, WCX would have to abandon its sunk investment, incur entirely new costs, and

suffer a long delay. WCX would not be able to enter the M2M market for years, nor could it roam in the interim.

284. In order for WCX to be able to use a device, it must both be “unlocked” and “open” by design.

285. There is an extremely limited market for open and unlocked devices, which limits WCX’s service, band, and device options.

286. Because WCX requires devices with hotspot functionality, many devices are unavailable to WCX.

B. AT&T’S DISPUTED FACTS

1. AT&T’s Data Roaming Agreements with Other Wireless Providers

1. AT&T currently has more than 35 commercially-negotiated data roaming agreements with other U.S. wireless providers, including larger providers such as T-Mobile and U.S. Cellular as well as smaller regional, local, and rural providers.

2. AT&T has developed a draft agreement pursuant to which it offers data roaming services on its own network. A copy of that draft agreement is attached as Exhibit 2 to the Declaration of Gram Meadors.

3. AT&T uses its draft data roaming agreement as a starting point for negotiations with other wireless providers, and the parties may modify it as needed to suit the particular circumstances of a given roaming arrangement.

4. AT&T’s draft data roaming agreement sets forth limits both on total data usage as well as individual customer usage.

5. [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END
CONFIDENTIAL]

6. Including all data roaming between AT&T and its domestic partners under AT&T's data roaming agreements, the weighted average data roaming rate in the January – August 2014 time period was [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL], with AT&T paying an average data-roaming rate of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] to roam on other providers' networks and the other providers paid an average data-roaming rate of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] to roam on AT&T's network

7. AT&T's domestic roaming partners have paid data roaming rates similar to those offered to WCX and have managed to maintain successful businesses.

2. Parties' Negotiations

8. AT&T negotiated in good faith with WCX in 2011-12 over a potential data roaming agreement.

9. In 2014, WCX approached [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [END HIGHLY CONFIDENTIAL]

11. AT&T negotiated in good faith with WCX in 2014 over a potential data roaming agreement.

3. WCX's Alternatives to Roaming with AT&T

12. AT&T is not WCX's only potential roaming partner.

13. There are many LTE networks in the areas adjacent to CMA 667 (WCX's service area) and nationwide.

14. The ability to roam on other LTE networks depends on the LTE bands that are compatible with the device used by the customer not on the LTE band(s) in a provider's home network.

15. Existing, commercially available wireless devices are typically compatible with a wide range of LTE bands in the U.S., including Band 2 (1900 MHz PCS), Band 4 (1700/2100 MHz AWS), Band 5 (850 MHz Cellular), Band 12 (Lower 700 MHz), Band 13 (Upper 700 MHz), Band 17 (Lower 700 MHz), Band 25 (1900 MHz PCS), Band 26 (800 MHz SMR) and Band 41 (2.5 GHz EBS/BRS).

16. The iPhone 6 supports sixteen different bands (including numerous international bands). The iPhone 6 therefore operates on all four U.S. national providers, regional and local U.S. providers, and various international providers.

17. Each of the devices offered on WCX's website support multiple bands and thus each is capable of roaming on multiple networks in addition to AT&T's network. The Google Nexus 7 supports Bands 2, 4, 5, 13, and 17. Although it is unclear which Samsung Galaxy Tablet WCX is offering, even one of the least expensive Samsung Galaxy tablets offered by AT&T supports bands 2, 4, 5, and 17. The Sierra Wireless Aircard 754S, which is a *2011 model*, supports two LTE bands (4 and 17), and thus can roam on multiple carriers.

18. The Band 17 LTE devices offered by AT&T support multiple other LTE bands:

Device	Category	4G LTE Bands Supported
Apple iPhone 6	Smartphones	1, 2, 3, 4, 5, 7, 8, 13, 17, 18, 19, 20, 25, 26, 28, 29
Apple iPhone 6 Plus	Smartphones	1, 2, 3, 4, 5, 7, 8, 13, 17, 18, 19, 20, 25, 26, 28, 29
Apple iPhone 5c	Smartphones	1, 2, 3, 4, 5, 8, 13, 17, 19, 20, 25
Apple iPhone 5s	Smartphones	1, 2, 3, 4, 5, 8, 13, 17, 19, 20, 25
Samsung Galaxy Note 4	Smartphones	1, 2, 3, 4, 5, 7, 12, 17, 20, 29

Amazon Fire Phone	Smartphones	1, 2, 3, 4, 5, 7, 8, 17, 20
Samsung Galaxy Alpha	Smartphones	1, 2, 3, 4, 5, 7, 12, 17, 29
Samsung Galaxy Note 3	Smartphones	1, 2, 4, 5, 7, 17
Samsung Galaxy S 5	Smartphones	1, 2, 3, 4, 5, 7, 17
Samsung Galaxy S 5 Active	Smartphones	1, 2, 3, 4, 5, 7, 17
Nokia Lumia 635	Smartphones	2, 4, 5, 7, 17
LG G3 Vigor	Smartphones	1, 2, 3, 4, 5, 7, 17
LG G Vista	Smartphones	1, 2, 4, 5, 17
Moto X (2nd Generation)	Smartphones	2, 4, 5, 7, 17, 29
LG G3	Smartphones	1, 2, 3, 4, 5, 7, 17, 29
Samsung Galaxy S 4 mini	Smartphones	2, 4, 5, 17
LG G2	Smartphones	1, 2, 4, 5, 17
LG G Flex	Smartphones	1, 2, 3, 4, 5, 7, 17
Samsung Galaxy S 4 zoom	Smartphones	2, 4, 5, 17
Samsung Galaxy S 4 - 16GB	Smartphones	1, 2, 4, 5, 7, 17
Moto X	Smartphones	2, 4, 5, 17
Samsung Galaxy Mega	Smartphones	1, 2, 4, 5, 7, 17
Samsung Galaxy S III mini	Smartphones	2, 4, 5, 17
Samsung Galaxy S III	Smartphones	4, 17
NEC Terrain	Smartphones	4, 17; upgradeable to 2, 5
Nokia Lumia 1520 - 16GB	Smartphones	2, 4, 5, 7, 17
LG Optimus G Pro	Smartphones	2, 4, 5, 17
BlackBerry Q10	Smartphones	2, 4, 5, 17
Nokia Lumia 1020	Smartphones	2, 4, 5, 17
Samsung Galaxy Rugby Pro	Smartphones	4, 17
Apple iPad with Retina display Wi-Fi + Cellular 16GB	Tablet	4, 17
LG G Pad 7.0 LTE	Tablet	2, 4, 5, 17
Samsung Galaxy Tab S 10.5	Tablet	1, 2, 3, 4, 5, 7, 17, 29
Samsung Galaxy Tab S 8.4	Tablet	1, 2, 3, 4, 5, 7, 17, 29
Samsung Galaxy Tab 4 10.1	Tablet	1, 2, 3, 4, 5, 7, 17
Samsung Galaxy Note Pro 12.2	Tablet	2, 4, 5, 17
Samsung Galaxy Tab 4 8.0	Tablet	1, 2, 3, 4, 5, 7, 17
Samsung Galaxy Tab 3 7.0	Tablet	2, 4, 5, 17
Nokia Lumia 2520 - Silk Black	Tablet	4, 17, 25
Apple iPad Air with Wi-Fi + Cellular	Tablet	1, 2, 3, 4, 5, 7, 8, 13, 17, 18, 19, 20, 25, 26
Apple iPad mini with Retina display with Wi-Fi + Cellular	Tablet	1, 2, 3, 4, 5, 7, 8, 13, 17, 18, 19, 20, 25, 26
Samsung Galaxy Tab 2 10.1	Tablet	4, 17

Apple iPad mini with Wi-Fi + Cellular 16GB	Tablet	2, 4, 5, 17
Samsung Galaxy Note 8.0	Tablet	2, 4, 5, 17
AT&T Unite Pro	Mifi	2, 4, 5, 17
AT&T Unite	Mifi	2, 4, 5, 17
AT&T Beam	Mifi	2, 4, 5, 17

19. The LTE bands supported by the four national wireless service providers, as well as the bands supported by regional carriers U.S. Cellular and C-Spire, are as follows:

	Band 2 (1900)	Band 4 (1700/ 2100)	Band 5 (850)	Band 12 (Lower 700)	Band 13 (Upper 700)	Band 17 (Lower 700)	Band 25 (1900)	Band 26 (800)	Band 41 (2500)
AT&T	X	X	X			X			
Verizon		X			X				
T-Mobile	X	X		X					
Sprint							X	X	X
U.S. Cellular			X	X					
<i>C-Spire</i>	X	X							

20. It would be contrary to industry practice for a wireless provider to limit its user devices to the same bands and spectrum used in the wireless provider's home network.

21. Carriers typically procure devices that operate on multiple frequencies, air interface technologies and band classes in order to be able to obtain roaming from multiple roaming partners.

22. Even if WCX chooses to roam only on other networks that use the same spectrum it uses in its home network (Lower 700 MHz B block), WCX is not limited to roaming on AT&T's Band 17 network. WCX's spectrum is compatible with Band 12, which has many options for data roaming.

23. Band 12 is currently supported by T-Mobile, U.S. Cellular, and other providers. There are numerous smaller wireless providers throughout the country that use (or plan to use) Band 12 for LTE in their home networks.

4. AT&T's Proposed Data Roaming Agreement

24. The AT&T proposal is a two-way agreement with terms and conditions similar to those agreed to in “dozens of actual commercial negotiations” with other wireless providers.

a. Usage Restrictions

25. Section 11 of the AT&T proposal sets forth most of the usage restrictions and is commercially reasonable.

i. Prohibition of Resale

26. Section 11(b)'s [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] is a standard provision to which AT&T has agreed in dozens of commercial negotiations of data roaming agreements with other wireless providers, appearing in nearly all of the data roaming agreements to which AT&T is a party.

27. Consistent with the Commission's *Data Roaming Order*, the purpose of the Section 11 [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] is to prevent both traditional and backdoor resale—*i.e.*, a wireless provider's use of a roaming agreement to sell services to customers residing outside of its network area.

28. The provisions of AT&T's offer that limit the wireless services provided under a data roaming agreement with WCX to roaming, [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [END CONFIDENTIAL] are commercially reasonable.

ii. Machine-to-Machine Services

29. The AT&T proposal does not erect barriers to entry for WCX to provide M2M services.

30. WCX does not have a business plan to provide M2M services. It has a concept to provide M2M service that it has not been able to develop further because it relies on WCX

being able to resell service on AT&T's network contrary to AT&T's proposed data roaming terms and the Commission's *Data Roaming Order*.

31. It is not commercially reasonable for WCX to offer M2M services via a data roaming agreement to customers that reside outside its network coverage area, which would allow WCX to act as an MVNO, reselling AT&T's services to retail customers whose "home" network is AT&T in direct contravention of the "no backdoor resale" requirement in the *Data Roaming Order*.

32. AT&T does not object to WCX selling M2M services to its customers but, consistent with the *Data Roaming Order*, WCX must do so by selling services to customers that reside in its own network coverage area or through a resale agreement with a facilities-based provider for customers that reside outside its network coverage area.

iii. Limit on Total Traffic Volume

33. The limit on total traffic volume in Section 11(a) of AT&T's proposal is commercially reasonable.

34. The provisions on usage restrictions in AT&T's data roaming agreements have evolved over time as AT&T and its domestic roaming partners have gained more experience with data roaming agreements.

35. [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END

CONFIDENTIAL]

36. Some of AT&T's domestic roaming partners have abused their roaming agreements with AT&T by reselling AT&T's data roaming services.

37. [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL]

38. [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] . [END CONFIDENTIAL]

39. AT&T has been willing to make reasonable adjustments in the [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL] to an aspirational objective of 50% (in 2014) that they will “endeavor” to honor, in place of a limit.

iv. Limits on Individual Accounts

40. Section 11(b) of the AT&T proposal imposes limits on individual accounts and is commercially reasonable.

41. Usage restrictions on individual accounts are in most of AT&T’s data roaming agreements with other wireless providers.

42. Section 11(b) of the AT&T proposal is designed to ensure that WCX’s customers who roam on AT&T’s network do, in fact, reside in WCX’s licensed area.

43. Without usage restrictions on individual accounts, WCX would be free to use the data roaming agreement to sell services to customers located outside of its licensed area and effectively engage in resale, in contravention of the *Data Roaming Order*.

44. It is commercially reasonable for AT&T to seek to protect its investment in its network from backdoor resale.

45. AT&T's proposed usage restrictions are not aimed at situations where a family member spends extended periods of time outside of the wireless provider's home network.

46. AT&T's proposed usage restrictions are designed to prevent a wireless provider from using an AT&T roaming agreement as a backdoor means to resell AT&T services.

47. AT&T's proposed usage restrictions are fully consistent with industry practice.

b. Roaming Rates

48. AT&T's proposed roaming rates are commercially reasonable.

49. AT&T's proposed roaming rates are based on the market rates for data roaming service as established by the dozens of commercially-negotiated data roaming agreements AT&T has entered into with other wireless providers.

50. AT&T's proposed roaming rates are "significantly below the average rates [AT&T is currently] paying to its domestic roaming partners."

51. The [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] rate for LTE included in AT&T's proposal is the same rate for LTE service included in AT&T's draft agreement (Exhibit 2 to the Declaration of Gram Meadors) as well as the five arm's length agreements discussed by Mr. Orszag in paragraph 50 of his declaration.

52. The data roaming agreements AT&T has entered into with other domestic roaming partners typically include a special rate for usage that exceeds the usage limitations.

53. [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL]

54. [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END

CONFIDENTIAL]

55. The special rate is an important aspect of data roaming agreements because it provides an incentive to the parties to comply with the applicable usage restrictions.

56. WCX could continue to expand the geographic reach of its wireless network through means other than roaming.

57. Dozens of other wireless providers have agreed to roaming rates similar to what AT&T has proposed to WCX, and those wireless providers have managed to maintain successful businesses.

c. Other Provisions

i. Audit Rights (Section 11(c))

58. The audit provision in Section 11(c) of the AT&T proposal is commercially reasonable.

59. Audit provisions are often found in commercial agreements.

60. Section 11(c) is a mechanism to confirm that contractual provisions are being followed.

61. Section 11(c) was included in the AT&T proposal in an attempt to avoid the expense and inconvenience of further dispute resolution in light of AT&T's experience with having to litigate payment disputes with Mr. Feldman's other companies, one of which (UTEX) went bankrupt while owing AT&T millions of dollars.

62. Section 11(c) of the AT&T proposal reduces the chance that the Parties will have to litigate payment disputes.

63. Section 11(c) of the AT&T proposal provides that a [BEGIN CONFIDENTIAL]
[REDACTED] [END CONFIDENTIAL] As a result, AT&T could not "manipulat[e] [] the underlying information in order to find a 'violation'" or use an audit as a "gotcha" to "to terminate roaming at its discretion on the flimsiest of pretexts."

64. To the extent that WCX has specific concerns about the specific audit process under Section 11(c) of the AT&T proposal, the issue could be addressed in further negotiations.

65. WCX never raised concerns about Section 11(c) of the AT&T proposal during Parties' negotiations.

66. AT&T remains willing to negotiate with WCX about Section 11(c) of the AT&T proposal.

ii. Suspension and Termination (Sections 17 and 20)

67. AT&T's proposed suspension and termination provisions in Sections 17 and 20, respectively, are commercially reasonable.

68. The suspension and termination provisions set forth in Sections 17 and 20 of the AT&T proposal, respectively, are standard contract terms and conditions providing the types of protections that wireless providers expect to find in data roaming agreements.

69. Similar suspension and termination provisions appear in all of AT&T's dozens of data roaming agreements with other wireless providers.

70. The suspension and termination provisions set forth in Sections 17 and 20 of the AT&T proposal, respectively, are fully consistent with the *Data Roaming Order*, which recognized a network operator's right to take necessary steps to protect its network.

71. The Commission has noted that suspension of service provisions are already a feature of many commercially-negotiated agreements.

72. There is no evidence supporting the assertions that (i) the suspension and termination provisions in the AT&T proposal would allow AT&T to "suspen[d] or terminat[e] [service to WCX's customers] at [AT&T's] discretion without notice or any other due process," (ii) "AT&T would have the incentive to suspend early and often . . . even when WCX had done

absolutely nothing wrong,” and (iii) WCX “likely [would] not survive” such events, are unfounded.

73. The suspension and termination provisions set forth in Sections 17 and 20 of the AT&T proposal, respectively, are not ambiguous as to when suspension and/or termination might be warranted.

74. Consistent with commercial contracting practices, the suspension and termination provisions set forth in Sections 17 and 20 of the AT&T proposal, respectively, set forth specific instances when suspension and/or termination are warranted, while at the same time remaining broad enough to cover circumstances that might not have been anticipated at the time of contract formation.

75. AT&T has expressed its willingness to negotiate with WCX over the suspension and termination provisions set forth in Sections 17 and 20 of the AT&T proposal, respectively.

76. The specific terms of the suspension and termination provisions were not discussed during the Parties’ negotiations.

iii. Binding Arbitration (Section 23(b))

77. Section 23(b) of the AT&T proposal is commercially reasonable.

78. Arbitration provisions are common in commercial contracts.

79. The Commission noted in the *Data Roaming Order* that parties were free to enter into mandatory arbitration agreements in connection with data roaming agreements.

80. AT&T has negotiated to include arbitration provisions in all of its data roaming agreements with other wireless providers.

81. The specific terms of the arbitration provision were not discussed during the Parties’ negotiations.

iv. Limits of Liability (Section 24)

82. Section 24 of the AT&T proposal is commercially reasonable.

83. Provisions limiting liability are standard in AT&T's dozens of commercially-negotiated data roaming agreements with other wireless providers.

84. The specific terms of this provision were not discussed during the parties negotiations.

v. Network Monitoring

85. The AT&T proposal [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED] [END
CONFIDENTIAL]

86. The provisions in AT&T's proposal [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [END CONFIDENTIAL] are commercially reasonable.

87. There is no evidence supporting WCX's allegation that AT&T might abuse its rights under the AT&T proposal to monitor traffic on its network, including data roaming traffic, and take steps to address network congestion.

88. There is no evidence that AT&T is going to abuse its control over its network and invade the privacy of WCX's customers, nor is that AT&T's objective.

89. The AT&T proposal seeks to confirm AT&T's rights to operate and control its network and serve the needs of its customers.

90. Consistent with the *Data Roaming Order*, monitoring provisions in the AT&T proposal are "commercially reasonable measure[s] to safeguard the quality of service against network congestion that may result from roaming traffic or to prevent harm to the network."

91. WCX identifies no criticisms of AT&T's customer privacy policy, which is referenced in AT&T's proposal.

92. No specific network monitoring terms were discussed during the Parties' negotiations.

vi. Vague and Ambiguous Terms (No Provision Cited)

93. WCX raises objections to only a handful of the [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] comprising the AT&T proposal.

94. To the extent there is any perceived "vagueness" or "ambiguity" in other terms, the clarification of those terms could be resolved between the Parties via commercial negotiation, rather than litigation.

5. WCX's Proposed Data Roaming Agreement

95. The RWA Model Agreement is not commercially reasonable.

a. Usage Restrictions

96. The lack of specific usage restrictions in the RWA Model Agreement is not commercially reasonable.

97. AT&T contended throughout the Parties' negotiations (and still maintains) that WCX's proposal of the "endeavor to provide" provision amounts to "resale, not roaming."

b. Roaming Rates

98. WCX's proposed data roaming rate is not commercially reasonable.

99. WCX's proposed data roaming rate is far outside the range of commercially-negotiated data roaming rates between AT&T and other wireless providers in dozens of data roaming agreements, which rates are presumptively commercially reasonable.

100. WCX's proposed data roaming rate is not the "prevailing retail rate."

101. AT&T's customers can choose from a range of data plans, which are priced in quantities of hundreds of megabytes or multiple gigabytes, not on a per-megabyte basis, and in which the price per gigabyte varies with the size of the data plan purchased.

102. Most wireless providers—including all five of the largest U.S. wireless providers—offer a range of data plans with different prices based on the amount of data included.

103. WCX's request that the Commission mandate the roaming rate in this case amounts to the "specific prescriptive regulation of rates."

c. Suspension of Service

104. Section 12 of the RWA Model Agreement allows only the "Home Carrier" to suspend service to all of its "Authorized Users" and is not commercially reasonable.

105. Under Section 12 of the RWA Model Agreement, AT&T's ability to suspend service to WCX's users would be sharply limited to instances such as defective or illegal equipment, technical problems, and fraudulent or unauthorized use, with no flexibility to counteract excessive roaming or network congestion.

106. Section 12 of the RWA Model Agreement requires that AT&T "continue to provide all services . . . while a dispute [between the Parties] [wa]s being resolved," which could take months under the RWA Model Agreement's dispute resolution provision, during which time AT&T would be powerless to act to protect its network or suspend service for nonpayment even when not subject to a *bona fide* dispute.

d. Term of Agreement/Termination Rights

107. Sections 2 (Term of Agreement) and 13 (Termination of the Agreement) of the RWA Model Agreement are not commercially reasonable.

108. Given the dynamic, rapidly-evolving nature of the domestic roaming market, it would not be commercially reasonable to require AT&T to enter into a perpetual agreement with no end date and subject only to such limited termination rights.

e. Miscellaneous

109. The RWA Model Agreement was not designed specifically for the technical requirements of the AT&T network.

110. The *Data Roaming Order* expressly grants network operators such as AT&T “significant flexibility” to control the terms of data roaming agreements, so long as the terms are commercially reasonable.

111. The *Data Roaming Order* “allows host providers to control the terms and conditions of the proffered data roaming agreements, within the general requirement of commercial reasonableness.”

112. AT&T has repeatedly expressed its willingness to negotiate with WCX in an attempt to resolve its concerns about the AT&T proposal.

III. KEY LEGAL ISSUES

Pursuant to 47 C.F.R. 1.732(h), the parties submit this statement of key legal issues presented by this Complaint proceeding. The inclusion of an issue as key does not necessarily mean that issue is disputed.

A. WCX’S KEY LEGAL ISSUES

1. The legal test for commercial reasonableness.

1. Whether the roaming rules contemplate that each party will propose terms. *Data Roaming Order* ¶¶79-80; *Voice Roaming Reconsideration Order* ¶¶37-40; 47 C.F.R. §20.12(d).

2. Whether the *Data Roaming Order* ¶9 established core policy goals of (1) ensuring access to seamless coverage nationwide, (2) innovation, (3) provide incentives for new

entrants and incumbents to invest network facilities, (4) seeking new entrants, and (5) promoting competition by multiple providers.

3. Whether AT&T's singular focus on the policy goal of incentivizing investment avoids the other policy goals announced in the Data Roaming Order.

4. Whether WCX can provide a viable service and earn a reasonable margin for reinvestment under AT&T's proposed terms.

5. Whether AT&T's proposed terms and conditions lack mutuality because they would cause considerable difficulty for WCX to support its customers' anticipated roaming at competitive prices.

6. Whether AT&T's proposed terms are so unreasonable as to be tantamount to a refusal to offer a data roaming arrangement. Data Roaming Order ¶86.

7. Whether AT&T's proposed terms would cause competitive harm to WCX because they are not financially, practically and operationally sustainable for a small, rural carrier and are not measurably different from having no roaming at all. *Id.*

8. Whether WCX has built out the areas it claims to have constructed. *Id.*

9. Whether it is economically feasible and realistic for WCX to build another nationwide network and whether AT&T holds a "head-start" advantage over WCX. *Id.*

10. Whether WCX is seeking roaming for areas outside WCX's licensed home area. *Id.*

11. Whether AT&T's proposed terms hinder WCX's ability to invest in facilities and coverage, services, and service quality in its home area by imposing excessive rates for roaming outside of WCX's home area. *Id.*

12. Whether WCX has any other alternatives devices and roaming partners for its LTE Band 17 service. *Id.*

13. Whether the combination of WCX's small rural licensed area and the higher than average movement out of area by its residents constitutes a "special and extenuating circumstance" that warrants consideration when prescribing terms.

14. Whether commercial reasonableness requires terms that meet both parties' needs and is in their mutual self-interest. WCX Reply p.9, Orszag Declaration ¶48.

15. Whether proffered terms are considered "on a case-by-case basis, taking into consideration the totality of the circumstances presented in each case." 47 C.F.R. §§20.12(d) and (e).

16. Whether the presumption of reasonableness established in the Data Roaming Order ¶81 refers only to challenges brought against agreements that the challenging party has already signed and therefore bears the burden of showing that the terms it has previously agreed to are commercially unreasonable.

17. Whether the Commission has ever before determined that a roaming agreement specific to one carrier and set of circumstances is presumptively reasonable as to a different carrier that faces a different set of circumstances.

18. Whether the commercial reasonableness standard "accommodates a variety of terms and conditions in data roaming" or whether only one set of terms and conditions may be imposed on all carriers that request roaming. Data Roaming Order ¶81.

19. Whether the commercial reasonableness standard allows "substantial room for individualized bargaining and discrimination in terms" (AT&T Legal Analysis p.16) or whether terms must be imposed on WCX in uniformity with all others.

20. Whether AT&T's proposed terms are commercially reasonable given WCX's specific set of circumstances.

21. Whether AT&T has proven that its other agreements contain the same or similar terms as those offered to WCX.

22. Whether the other parties to AT&T's roaming agreements concur that the agreements are commercially reasonable or have instead characterized the agreements as unreasonable in the T-Mobile petition for declaratory ruling proceeding.

23. Whether the term "commercially reasonable" has an existing legal construction arising from case law and texts that the Commission should apply.

24. Whether a "commercially reasonable" contract provision must be fair to both sides and cannot unduly prejudice either party.

25. Whether a "commercially reasonable" contract provision must serve the overall public interest.

26. Whether a "commercially reasonable" agreement, in this case, would result in terms that allow WCX and its customers to actually use roaming, does not prevent WCX from competing in the market, fairly compensates AT&T, and does not prejudice AT&T's ability to provide retail service to its own customers.

27. Whether AT&T's proposed terms or WCX's propose terms better fulfill the Commission's policy goals of ensuring "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.”¹

28. Whether commercially reasonable terms should serve the ultimate goals espoused in 47 U.S.C. §151.

2. AT&T’s duty to provide automatic roaming under Title II applies in this case.

29. Whether this case also involves Rule 20.12(a)(2) and (d) “automatic roaming.”

30. Whether WCX is a “technologically compatible, facilities-based CMRS carrier.” 47 C.F.R. §20.12(d).

31. Whether AT&T is subject to 47 C.F.R. §20.12(a)(2) and is obligated to “provide automatic roaming to any technologically compatible, facilities-based CMRS carrier.”

32. Whether WCX offers interconnected voice and data and text-messaging. 47 C.F.R. §20.12(a)(2).

33. Whether WCX’s voice and data services operate in real-time, are two-way switched, are interconnected with the public switched network, and utilize an in-network switching facility that enable WCX to reuse frequencies and accomplish seamless hand-offs of subscriber calls. 47 C.F.R. §20.12(a)(2).

34. Whether, when a WCX customer receives a regular phone call while roaming on AT&T’s LTE network, AT&T will be providing commercial mobile data roaming or automatic roaming.

35. Whether the distinguishing characteristic between automatic roaming and commercial mobile data roaming is the nature of the network involved or the nature of the service being received by the customer. 47 C.F.R. §§20.3 and 20.12(a)(2).

¹ *Data Roaming Order* ¶¶ 13, 40, 48.

36. Whether WCX is seeking roaming in order to support a WCX customer's use of a WCX-provided interconnected service – voice, data or messaging – and AT&T must therefore provide automatic roaming. Voice Roaming Order ¶28.

37. Whether automatic roaming or data roaming is involved when 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” on AT&T's LTE network.

38. Whether interconnected data service is subject to automatic roaming on AT&T's LTE network when the devices are “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), 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, 1 FCC Rcd 15975, 15981 ¶18 (2000).

39. Whether the automatic roaming rules exclude or otherwise distinguish interconnected service based merely on protocol or bandwidth differences.

40. Whether AT&T is required to provide “automatic roaming” to WCX “on reasonable and not unreasonably discriminatory terms and conditions,” pursuant to 47 U.S.C. §§201-202.

41. Whether, given that WCX and AT&T are technologically compatible, the Commission “shall presume that [WCX's] request ... for automatic roaming is reasonable

pursuant to Sections 201 and 202 of the Communications Act” and AT&T has the burden of rebutting this presumption. 47 C.F.R. §20.12(d).

42. Whether roaming terms covering LTE networks can and must only be evaluated under the “commercially reasonable” standard.

43. Whether LTE utilizes an in-network switching facility that enables frequency re-use and accomplishes seamless hand-off.

44. Whether WCX’s 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, particularly when they will still have and use their regular phone numbers.

45. Whether WCX’s proposed terms and conditions for automatic roaming are just and reasonable and non-discriminatory. 47 U.S.C. §§201-202.

3. AT&T has violated the roaming rules.

46. Whether AT&T has violated the roaming rules.

47. Whether AT&T has offered a commercial mobile data roaming arrangement on commercially reasonable terms and conditions as required under 47 U.S.C. §301 and 47 C.F.R. §20.12(e). Second Amended Complaint ¶41(A).

48. Whether AT&T’s failure to offer automatic roaming to support WCX’s interconnected services on AT&T’s LTE network as required by 47 U.S.C. §§201-202, 332 and 47 C.F.R. §20.12(a)(2) and (d) is a violation. Second Amended Complaint ¶41(B).

49. Whether AT&T’s failure to accept WCX’s proposed terms, conditions and prices for commercial mobile data roaming, which are commercially reasonable and meet the requirements of 47 U.S.C. §301 and 47 C.F.R. §20.12(e), is a violation. Second Amended Complaint ¶41(C).

50. Whether AT&T failure to accept WCX's presumptively reasonable request for automatic roaming to support WCX's interconnected services on AT&T's LTE network as required by 47 U.S.C. §§201-201, 332 and 47 C.F.R. §20.12(a)(2) and (d) is a violation. Second Amended Complaint ¶41(D).

51. Whether AT&T's positions and proposals have jeopardized WCX's ability to invest in further deployment of broadband in violation of 47 U.S.C. §1302. Second Amended Complaint ¶41(E).

52. Whether the remedy for a violation of the roaming rules is the promulgation of prescribed terms. Data Roaming Order ¶79.

53. Whether, after finding a violation of the roaming rules by AT&T, the Commission has the full range of alternatives to prescribe terms described in the Voice Roaming Reconsideration Order and the Data Roaming Order.

4. AT&T cannot inspect the content of WCX's users' communications or engage in network management practices beyond application-neutral congestion management.

54. Whether terms describing network management practices must be included in the parties' roaming agreement. Data Roaming Order ¶85.

55. Whether an absence of terms regarding network management practices would authorize the roaming provider to conduct traffic management and inspection for any purpose, including purposes wholly unrelated to legitimate security protections or congestion control.

56. Whether WCX's users have a right to privacy or retain a fundamental property right (the right to exclude others) when roaming on AT&T's network.

57. Whether AT&T may impose its own retail privacy policy on WCX's users without notice to them and without a contract between AT&T and the WCX user, and completely outside of the contract between WCX and its users.

58. Whether AT&T's proposed terms would have allowed AT&T to insert its now-abandoned "super-cookies" on WCX's users' devices while roaming.

59. Whether AT&T can track and monetize information gleaned about WCX's users if it is permitted to surveil WCX's users.

60. Whether AT&T can engage in some form of prioritization and either speed up or slow down WCX's users' roaming traffic using unknown criteria and do so independently of security or congestion concerns.

61. Whether the parties' roaming terms must contain some protective or 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.

62. Whether AT&T can search the content of WCX's users' communications with deep packet inspection and thereby invade their privacy.

63. Whether it is just and reasonable (automatic roaming) and commercially reasonable (commercial mobile data roaming) for AT&T, as the roaming provider, to appropriate other people's property, monetize it and freely disclose it to whomever it chooses, thereby violating WCX users' privacy.

5. WCX seeks roaming from AT&T, not resale.

64. Whether the Commission in the Data Roaming Order, Voice Roaming Order, or Voice Reconsideration Order intended to limit the amount of roaming, or the services they can enjoy while roaming by customers of a home carrier, or intended to limit the amount of roaming use a home carrier is to be allowed.

65. Whether home carriers, particularly small carriers with limited licensed areas, should be "incentivized" through onerous roaming conditions to construct extensive nationwide

access networks, even when they cannot feasibly obtain the necessary licenses that would be required.

66. Whether the Commission's policy goal of encouraging investment was intended to incent home carriers to invest in areas where they are not licensed.

67. Whether significant amounts of roaming transmute a roaming arrangement into a resale agreement as a matter of law.

68. Whether facilitating out-of-area roaming would encourage expanded in-home area investment and thereby further the Commission's policy goal of encouraging investment.

69. Whether the Commission prefers that providers not "rely on roaming arrangements in place of network deployment as the primary source of their service." Data Roaming Order ¶21.

70. Whether roaming should be limited to [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [END CONFIDENTIAL], as AT&T contends.

71. Whether more than de minimis roaming usage turns roaming in "back-door" "de facto" resale.

72. Whether roaming usage beyond de minimis or incidental usage constitutes the "primary source" of the home carrier's service. Data Roaming Order ¶21.

73. Whether home area service at or above 50% total usage constitutes the "primary source" of the home carrier's service. Data Roaming Order ¶21.

74. Whether roaming usage below 50% of total usage constitutes incidental or ancillary roaming in relation to the predominant, majority usage in the home area.

75. Whether, given the demographics and travel behavior of the residents of CMA 667, it is reasonable for AT&T's terms to immediately put WCX in breach for providing service to an average resident.

76. Whether, given the demographics and travel behavior of the residents of CMA 667, it is reasonable for AT&T's terms to immediately put WCX in breach for offering family plans, working with MVNO partners, supporting IoT applications, or participating in the emerging M2M market.

77. Whether AT&T's proposed terms would effectively prohibit WCX from having M2M, IoT and MVNO relationships.

78. Whether it is commercially reasonable or just and reasonable for AT&T to dis-incent developers of new technologies from partnering with WCX when WCX desires to enable, innovate and promote new uses of technology.

79. Whether AT&T's proposed terms are anticompetitive because they erect an insurmountable barrier to entry.

80. Whether AT&T's proposed terms requiring WCX to invest in its network to a greater degree than that required by the Commission, which WCX has exceeded, violate the roaming rules.

81. Whether it is reasonable and would serve the Commission's policy goals of promoting competition and ensuring seamless coverage if AT&T's proposed terms force WCX to severely restrict the usage of an average CMA 667 resident to such a degree that WCX's service cannot be used in a comparable manner to what they could use if they were AT&T customers.

82. Whether AT&T's roaming volume restrictions eliminate the ability of WCX's users to use their service and roam in the way that they intend and are therefore unreasonable.

83. Whether AT&T's terms are unreasonable because they do not allow sufficient flexibility regarding type of roaming use and volume of roaming use.

84. Whether WCX's proposed roaming limit of 50% of total usage and restriction to only customers with a significant connection to CMA 667 indicate that WCX's on-network, home area service will be its primary service and roaming a supplemental service.

85. Whether WCX's proposed terms would permit WCX to market service to customers with little or no connection to WCX's service territory.

86. Whether WCX's requirement that its customer have a significant connection to, and use, the home area network indicates that WCX services are primarily related to home-area service.

87. Whether roaming cannot be equated to resale when a provider is self-providing in the home area. In the Matter of Reexamination of Roaming Obligations of CMRS Providers and Other Providers of Mobile Data Services, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 25 FCC Rcd 4181, 31223, ¶89 (2010).

88. Whether the resale of WCX's service by business customers who allow roaming would still be roaming, or would instead constitute resale of AT&T's service.

6. The Commission can and should set the price equal to the prevailing retail rate.

89. Whether the Commission can and should use the prevailing retail rate as the benchmark for the roaming prices.

90. Whether AT&T's excessive roaming rates for interconnected services will result in harm to consumers and small carriers, such as WCX, because they will no longer be able to

offer competitively priced retail services with national coverage or they will have to impose severe constraints on roaming usage to limit the losses it incurs as a result of AT&T's punitive prices.

91. Whether roaming prices much higher than retail rates, such as those proposed by AT&T, would provide an incentive for WCX to invest in network construction in either its own licensed home area or in areas outside its home area where it is not licensed to operate or construct facilities.

92. Whether, when the Commission referred to roaming rates that are "much higher than retail rates" in the Voice Reconsideration Order, it was describing "in-home" roaming or out-of-area automatic roaming.

93. Whether roaming rates benchmarked at the prevailing retail rate for out-of-area roaming would deter investment within a carrier's in-home area.

94. Whether a provider without spectrum licenses in any given area has an incentive and opportunity to invest in that area.

95. Whether AT&T will be deterred from investing in its network if it does not earn supranormal profits for providing roaming service.

96. Whether there must be a limiting principle in a roaming agreement, and some price point above which a price is no longer "just and reasonable" (automatic roaming) or "commercially reasonable" (data roaming).

97. Whether WCX would be functionally precluded from offering roaming because of AT&T's extraordinarily high and punitive price terms.

98. Whether AT&T's extraordinarily high price terms are just and reasonable (automatic roaming) and commercially reasonable (commercial mobile data roaming), fair to both sides, and serve the overall public interest.

99. Whether WCX's retail benchmark price is just and reasonable (automatic roaming) and commercially reasonable (commercial mobile data roaming), fair to both sides, and serves the overall public interest.

100. Whether the Commission can prescribe the roaming price that will be contained in the agreement in the contest of a roaming complaint where price is a disputed issue.

101. Whether it is just and reasonable or commercially reasonable for the roaming price to be commensurately reduced over time as costs and prices decline, such as would occur if roaming rates are benchmarked at the prevailing retail rate.

7. AT&T's audit terms are vague and unnecessary; its suspension terms are not consistent with those contemplated by the roaming orders.

102. Whether audit provisions are necessary if a clear usage limit, such as WCX's proposed less than 50% roaming limit, is prescribed.

103. Whether, if audit terms are prescribed, specificity regarding the records to be maintained, the usage metrics, and proof of "residency" should be included.

104. Whether suspension terms that allow AT&T to unilaterally suspend WCX's roaming service while a matter is in dispute resolution, with no provision for the dispute resolution forum to require AT&T to maintain or restore service, would facilitate anticompetitive conduct.

105. Whether terms that allow the parties to seek Commission or judicial intervention to prevent irreparable injury in appropriate circumstances should be prescribed.

8. The Commission cannot impose binding commercial arbitration on an unwilling party.

106. Whether the Commission intended in the Data Roaming Order that parties to an already-executed roaming agreement could bring dispute using the §208 complaint process or whether the Commission intended for all disputes to be subject to mandatory and exclusive binding commercial arbitration.

107. Whether 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 Commission rule.

108. Whether an administrative agency can compel a party against its will to agree to contract terms providing for mandatory binding compulsory commercial arbitration as the exclusive means of dispute resolution.

9. AT&T is the only available roaming partner for WCX.

109. Whether WCX has recourse to other roaming providers or is limited to roaming on AT&T because it controls the only ubiquitous LTE network compatible with WCX technology.

110. Whether fully “open” multi-band devices are feasibly available to WCX as a means to use alternative networks using other network technologies.

B. AT&T’S KEY LEGAL ISSUES

1. Whether WCX’s claims under Rule 20.12(e) fail because AT&T has offered to provide WCX data roaming service on commercially reasonable rates, terms and conditions.

1. WCX’s Claims Are Based on a Fundamental Misunderstanding of the Commission’s “Commercial Reasonableness” Standard

2. Whether the Commission’s commercial mobile data roaming rules require facilities-based providers of commercial mobile data services to offer data roaming to other providers on “commercially reasonable” terms and conditions.²

3. Whether the commercial reasonableness standard is different from the just and reasonable standard applicable to common carrier automatic roaming, which is subject to Title II.

4. Whether the “commercially reasonable” standard is more flexible than the “just and reasonable” standard applicable to common carriage regulations.

5. Whether the “commercially reasonable” standard precludes “prescriptive regulation of rates” and instead grants “host providers appropriate discretion in the structure and level of such rates they offer.” Data Roaming Order ¶ 78.

6. Whether the “commercially reasonable” standard applicable to data roaming services leaves “substantial room for individualized bargaining and discrimination in terms.” *Cellco P’ship v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012).

7. Whether “commercially reasonable” standard “accommodate[s] a variety of terms and conditions in data roaming,” Data Roaming Order ¶ 81, and permits “host providers to control the terms and conditions of proffered data roaming arrangements, within a general requirement of commercial reasonableness,” Data Roaming Order ¶ 33.

8. Whether the Commission designed the “commercial reasonableness” standard to balance the core policy goal of widespread availability of data roaming with the need to encourage facilities-based investment. Data Roaming Order ¶¶ 13, 40, 48.

² *Data Roaming Order* ¶¶ 1, 9, 42.

9. Whether the Commission, in establishing a “commercially reasonable” standard to govern the provision of broadband data service sought to ensure that the Commission’s data roaming regulations would not discourage broadband investment. Data Roaming Order ¶ 34.

10. Whether the Commission’s data roaming regulations should not be interpreted to provide “a backdoor way to create de facto mandatory resale obligations.” Data Roaming Order ¶ 88.

11. Whether the Commission has ruled that specific disputes over the commercial reasonableness of terms are to be resolved “based on the totality of the circumstances,” including but not limited to seventeen factors enumerated in the Data Roaming Order.³

12. Whether the Commission has stated that, in assessing the seventeen factors, it will apply a presumption that signed marketplace agreements that have never been challenged are commercially reasonable.⁴

13. Whether the terms and conditions in signed, arms-length data roaming agreements, entered into in the commercial marketplace, are presumed by the Commission to be commercially reasonable. Data Roaming Order ¶ 81.

14. Whether in its capacity as “[a] facilities-based provider of commercial mobile data services,” AT&T’s obligation under Rule 20.12(e) is “to offer roaming arrangements to other such providers on commercially reasonable terms and conditions.”⁵

³ *Data Roaming Order* ¶¶ 74, 86.

⁴ *Data Roaming Order* ¶ 81 (Commission will “presume” that “the terms of a signed agreement meet the reasonableness standard and will require a party challenging the reasonableness of any term in the agreement to rebut that presumption”); *see also id.* ¶ 86 (“[T]o guide us in determining the reasonableness of . . . the terms and conditions of the proffered . . . we may consider . . . whether the providers involved have had previous data roaming arrangements with similar terms . . . [and] whether the parties have any roaming arrangements with each other, including roaming for interconnected services such as voice, and the terms of such arrangements.”).⁵ 47 C.F.R. § 20.12(e)(1).

⁵ 47 C.F.R. § 20.12(e)(1).

15. Whether under the Commission’s data roaming rules, WCX bears the burden to prove that AT&T’s data roaming offer is not commercially reasonable.

2. AT&T Has Offered WCX Data Roaming on Commercially Reasonable Rates and Terms

a. AT&T’s Proposed Data Roaming Rates are Commercially Reasonable

16. Whether data roaming rates proposed by AT&T to WCX are commercially reasonable under the circumstances.

17. Whether AT&T’s proposed roaming rates are commercially reasonable because inter alia, they are consistent with – and at the lower end of – the prevailing marketplace rates for wholesale roaming.

b. AT&T’s Restrictions on Resale and Roaming Are Commercially Reasonable

18. Whether the restrictions on resale and roaming proposed by AT&T to WCX are commercially reasonable.

19. Whether AT&T’s proposed restrictions on resale and roaming are commercially reasonable because, inter alia, such provisions are common in scores of data roaming agreements in the commercial marketplace.

20. Whether AT&T’s proposed restriction on resale of data roaming services by WCX is commercially reasonable because it prevents “both traditional and ‘backdoor’ resale— i.e., a wireless carrier’s use of a roaming agreement to sell services to customers residing outside its network area.” *Data Roaming Order* ¶ 88.

21. Whether the Commission's *Data Roaming Order* allows providers such as AT&T to propose terms that limit their offer of data roaming service to prevent *de facto* resale arrangements.

c. The Provisions That Allow AT&T To Enforce its Contractual Rights and Protect its Network Facilities Are Commercially Reasonable

i. Audit Provision

22. Whether AT&T's audit provisions in its proposal to WCX are commercially reasonable because such provisions are commonly found in roaming agreements entered into in the commercial marketplace.

23. Whether the proposed audit provisions offered by AT&T to WCX are commercially reasonable under the circumstances given AT&T's prior experiences with entities companies led or controlled by WCX's CEO Mr. Feldman.

ii. Suspension and Termination of Service

24. Whether AT&T's proposed provisions offered to WCX governing suspension and termination of service are commercially reasonable under the circumstances.

25. Whether AT&T's proposed provisions offered to WCX governing the suspension and termination of data roaming services are commercially reasonable because such terms are standard contract terms and conditions that appear in dozens of roaming agreements between AT&T and other wireless carriers.

26. Whether AT&T's proposed provisions governing the suspension and termination of service are commercially reasonable in light of AT&T's prior experiences with companies led or controlled by WCX's CEO Mr. Feldman.

iii. Dispute Resolution

27. Whether the dispute resolution provisions offered by AT&T to WCX are commercially reasonable under the circumstances.

28. Whether the dispute resolution provisions offered by AT&T to WCX are commercially reasonable given that similar dispute resolution terms are found in countless commercial contracts.

29. Whether the dispute resolution offered by AT&T to WCX are commercially reasonable given that the Commission has explained that providers in the marketplace were “free to negotiate and mutually agree to other processes, such as third party mediation or arbitration, as a means to resolve the roaming dispute.” *Data Roaming Order* ¶ 83.

iv. Network Monitoring

30. Whether the Commission recognized in the *Data Roaming Order* that mobile providers can and must employ congestion management measures and protect against network harm, and whether terms and conditions designed to address such issues are commercially reasonable. *Data Roaming Order* ¶¶ 52-56.

31. Whether the network monitoring provisions in the AT&T’s proposal are “commercially reasonable measures to safeguard the quality of service against network congestion that may result from roaming traffic or to prevent harm to the network.” *Data Roaming Order* ¶ 23.

3. The RWA Model Agreement Proposed by WCX Is Not Commercially Reasonable

32. Whether The RWA Model Agreement proposed by WCX is commercially reasonable.

a. WCX's Proposed Data Roaming Rate Is Not Commercially Reasonable

33. Whether WCX's proposed data roaming rate is commercially reasonable.

34. Whether proposed data roaming rates may be capped by retail rates even though the Commission has explained that “the relatively high price of roaming compared to providing facilities-based service will often be sufficient to counterbalance the incentive to ‘piggy back’ on another carriers’ network.” *Data Roaming Order* ¶ 21.

35. Whether any proposed prescription of rates for wholesale data roaming service based on prevailing retail roaming rates is prohibited because it would transform the private carriage “commercial reasonableness” standard into a common carriage regime in violation of the Communications Act.

b. The RWA Model Agreement's Omission of Specific Usage Restrictions Is Not Commercially Reasonable

36. Whether the absence of specific usage prescriptions proposed by WCX is commercially reasonable.

37. Whether WCX is correct that “[e]ven if 99.9999% of WCX’s customer data usage was via roaming on AT&T’s network, WCX’s use would still be roaming and would not be engaged in resale because the roaming usage would still be supplemental, incidental and not primary.” Feldman Decl. ¶ 19 (Compl. at 52).

38. Whether WCX’s proposed resale restriction – whereby it would “endeavor to provide the majority of its customers’ Data Services on its own Network” – is inconsistent with the Commission’s admonition that data roaming obligations may not be used by providers “as a backdoor way to create *de facto* mandatory resale obligations.” *Data Roaming Order* ¶ 88.

c. Other Terms of the Proposed RWA Model Agreement Are Not Commercially Reasonable

39. Whether Section 12 of the proposed RWA Model Agreement is commercially reasonable even though it would allow AT&T no flexibility to suspend service on its network to counteract excessive roaming or network congestion.

40. Whether the proposed RWA Model Agreement is commercially reasonable even though it provides that the agreement shall continue “in perpetuity” (Section 2) subject to very limited termination rights (Section 13).

4. Data Roaming Is Not Subject to Title II Common Carrier Obligations

41. Whether 47 U.S.C. § 332(c) prohibits a provider of broadband data services from being treated “as a common carrier for any purpose under this chapter.” 47 U.S.C. § 332(c).

42. Whether the Commission held it would not apply the Title II just and reasonable standard to wholesale commercial mobile data roaming arrangements, stating “we here reject – rather than determine how to enforce – a common carriage requirement of ‘just and reasonable’ rates, terms, and conditions.”⁶

43. Whether the D.C. Circuit has concluded that it is “obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers.” *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014).

44. Whether the broadband data services addressed in the Commission’s *Data Roaming Order* that are at issue in this proceeding are common carrier services subject to Title II of the Communications Act.

⁶ *Data Roaming Order* ¶ 68 n.198 (emphasis in original).

45. Whether AT&T's data roaming proposal to WCX is subject to Title II common carrier obligations even though AT&T would be providing to WCX only non-interconnected broadband data service.

46. Whether the Commission's voice-roaming rules apply to "mobile data service that is not interconnected with the public switched network." *Data Roaming Order* ¶ 41.

47. Whether the commercially reasonable standard set forth by the Commission is more flexible than the "just and reasonable" standard applicable to common carriage under Title II of the Communications Act.

5. The Remaining Statutes Identified by WCX Do Not Support a Claim for Relief Against AT&T

48. Whether WCX has stated a claim against AT&T under 47 U.S.C. §§ 201(b), 202(a), and 332 even though these provisions apply only to common carriers and not providers of data roaming services.

49. Whether Section 301 is a general statement of purpose that authorizes the Commission to regulate "radio communications" and "transmission of energy by radio." 47 U.S.C. § 301.

50. Whether Section 301 (1) imposes no obligations on AT&T, let alone obligations that are independent of those adopted by the Commission in Rule 20.12(e), or (2) creates no private right of action for WCX to file suit against AT&T.

51. Whether WCX has stated a claim against AT&T under 47 U.S.C. § 301, which imposes no obligations on providers of wireless broadband services with regard to their interactions with other private parties and creates no private right of action on the part of WCX against AT&T.

52. Whether Section 157(a) reflects a general policy of the United States “to encourage the provision of new technologies and services to the public” *id.* § 157(a), and Section 1302 exhorts the Commission to “encourage the deployment . . . of advanced telecommunications capability to all Americans,” *id.* § 1302(a).

53. Whether Section 157(a) and Section 1302 impose any substantive obligations on AT&T or authorize WCX to file a suit before the Commission based on a “violation” of their terms.

54. Whether WCX has stated a claim against AT&T under §§ 157(a) and 1302, where these statutes provide no private right of action for WCX to bring claims against AT&T.

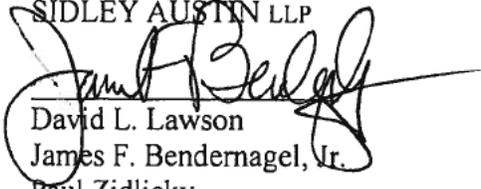
55. Whether WCX has stated a claim against AT&T under 47 U.S.C. § 254, where section 254 sets forth a variety of obligations relating to the Commission’s universal service funding programs but no obligations as between AT&T and WCX.

* * *

Dated: December 11, 2014

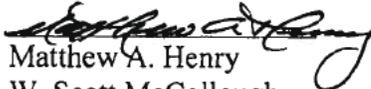
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