REVISED
PUBLIC VERSION

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 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	)	

ANSWERING SUBMISSION OF AT&T MOBILITY LLC

SUMMARY

AT&T Mobility LLC ("AT&T") submits this Answer (the "Answer") and supporting documents (together, "Answering Submission") to the Amended Complaint filed by Worldcall Interconnect, Inc. ("WCX") (together with AT&T, the "Parties"), on October 1, 2014 (the "Amended Complaint"),[1] in the above-captioned proceeding before the Federal Communications Commission (the "Commission"). WCX's Amended Complaint generally alleges that AT&T has refused to provide WCX data roaming on "commercially reasonable" terms and therefore has violated the Commission's rules. The Amended Complaint seeks a finding that AT&T's proposed data roaming offer is not commercially reasonable and requests entry of an Order directing AT&T to provide data roaming services to WCX on the terms and conditions set forth in the Rural Wireless Association's (the "RWA") model data roaming agreement (the "RWA Model Agreement").

AT&T's Answering Submission shows that WCX has failed to meet its burden in this case. As the complainant, WCX bears the burden of demonstrating that AT&T's proposed terms and conditions are not commercially reasonable under the requirements set forth in the Commission's *Data Roaming Order*.[2] WCX cannot carry this burden because the AT&T proposal is plainly commercially reasonable. AT&T's Answering Submission demonstrates that its proposal incorporates standard terms and conditions forged in dozens of actual commercial negotiations with other wireless carriers and in many cases based on GSMA provisions.

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[1] As a result of an agreement between the parties, WCX is going to file a Second Amended Complaint. Pursuant to the agreement, the Second Amended Complaint will include revisions to ¶¶ 65, 73, 75, 77, 86, 87 and 91 of the complaint itself and ¶ 14(c) of the Supplemental Declaration of Lowell Feldman. The revisions address certain confidentiality concerns that AT&T had raised regarding the above identified paragraphs; the substance of WCX's allegations has not changed. Because the Second Amended Complaint has not yet been filed, AT&T refers in this Answering Submission to the Amended Complaint and its citations are to the Amended Complaint. However, both its responses and its citations apply equally to the allegations of the Second Amended Complaint.

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

Consistent with the commercial reasonableness standard, the AT&T proposal ensures that WCX's consumers have "seamless [data roaming] coverage nationwide" while maintaining incentives for WCX to invest in its own wireless network facilities.[3] The rates and terms that AT&T has proposed are consistent with—and, in a number of respects, better than—the rates and terms contained in numerous marketplace agreements that AT&T has entered into with other providers. The rates and terms in those agreements are not preventing those providers from offering competitive services and investing in their networks. And, those agreements have not been challenged and are presumptively commercially reasonable.[4]

WCX does not deny that AT&T proposes industry-standard terms and conditions. Instead, it contends that the Commission's rules somehow obligate AT&T to offer WCX far greater benefits than it provides to its other domestic roaming partners. In particular, WCX challenges (i) the rates AT&T has proposed, because they are higher than "retail" rates, and (ii) AT&T's proposed usage restrictions, which ensure that WCX does not use these roaming services as *de facto* resale. WCX also challenges a smattering of other standard provisions in AT&T's proposal, such as the audit and termination provisions, and includes a variety of other statutory claims. The Commission should reject all of WCX's arguments.

First, as the Answering Submission shows, AT&T's proposed rates are consistent with other marketplace agreements and are therefore commercially reasonable. Although WCX argues that the rules require AT&T to propose rates that are no higher than retail rates, in fact the Commission has expressly rejected retail rates as a benchmark for wholesale roaming rates, and

[3] *Data Roaming Order* ¶ 9.

[4] *See Data Roaming Order* ¶ 81.

has indicated that it expects roaming rates to be "*much higher* than retail rates"[5] in order to "counterbalance the incentive" to "rely[] on another provider's network."[6]

Similarly, AT&T's proposed usage restrictions are commercially reasonable and, indeed, standard. Contrary to WCX's claims, the Commission has expressly held that requesting providers like WCX may not use data roaming as "a backdoor way to create *de facto* mandatory resale obligations."[7] But this is precisely what the RWA Model, which provides no meaningful usage restrictions, would accomplish. In contrast, AT&T's terms seek to protect its investment in its network from backdoor resale as the Commission's rules allow.

In addition, WCX challenges various other terms in the AT&T proposal, such as the suspension and termination provisions, that would allow AT&T to enforce the agreement's provisions that ensure that WCX does not use these data roaming services as *de facto* resale. Such terms are standard in all of AT&T's roaming agreements, and insofar as these provisions support AT&T's efforts to protect against backdoor resale, they are plainly commercially reasonable. But such provisions are especially reasonable as they relate to WCX in particular. Mr. Feldman and the Worldcall family of companies are frequent litigants in intercarrier disputes at the Commission, in the courts, and before state public utility commissions. In the past, AT&T has had to litigate payment disputes with Mr. Feldman's other companies, and provisions like the audit provision were included in the AT&T proposal in an attempt to avoid the expense of further dispute resolution.

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[5] Order on Reconsideration and Second Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 25 FCC Rcd. 4181 ¶ 32 n.90 (2010) (emphasis added) ("*Voice Roaming Order on Reconsideration*").

[6] *Data Roaming Order* ¶ 51; *see also id.* ¶ 21; *see also* Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817, n.102 ¶¶ 36-40 (2007).

[7] *Data Roaming Order* ¶ 88; *see also id.* ¶ 41 n.122.

Despite this, AT&T remains willing to negotiate with WCX to address its concerns. WCX has never made any serious effort, however, to negotiate these issues with AT&T within the framework of the Commission's rules. Instead, after abandoning negotiations with AT&T for over two years, WCX demanded that AT&T accept its radically one-sided RWA Model Agreement, which had never been the basis for any agreement adopted in the marketplace. WCX threatened from the beginning to bring a test-case before the Commission unless AT&T accepted WCX's demands. WCX's purpose thus has been to bring litigation in an attempt to press its patently erroneous interpretations of the data roaming rules. WCX's position here is in actuality an attempt to rewrite the data roaming rules in ways that the Commission expressly rejected in the *Data Roaming Order*, and its complaint is not an appropriate vehicle for such changes to the rules.

AT&T's Answering Submission fully supports its position that AT&T's proposed roaming offer to WCX is "commercially reasonable" and shows that WCX's claims to the contrary have no merit. In its Answer, AT&T provides an Introduction of its response to WCX's allegations followed by point-by-point responses to the allegations contained in the Amended Complaint. In support of its Answer, AT&T is also filing three declarations. The Declaration of Gram Meadors ("Meadors Declaration") provides the detailed facts concerning AT&T's history of negotiations with WCX and explains the purpose behind the disputed provisions in the AT&T proposal. The Declaration of Michael Prise ("Prise Declaration") rebuts WCX's contention that AT&T is a "must have" roaming partner; with the advent of LTE, WCX has a number of potential roaming partners. Finally, Jonathan Orszag, an economic expert, explains in his declaration ("Orszag Declaration") that AT&T's proposals are reasonably designed to promote roaming while also guarding against the use of these services as *de facto* resale that would

eliminate incentives for WCX to invest in its own broadband facilities and are commercially reasonable.

Pursuant to Section 1.724(c) of the Commission's rules, AT&T next includes its Legal Analysis in support of AT&T's Answer and Proposed Finding of Fact and Conclusions of Law. An Information Designation follows in compliance with Sections 1.724(f)(1), (2), (3), and 1.724(g). AT&T has also attached its objections to the interrogatories proposed by WCX and its own proposed interrogatories. Lastly, AT&T includes its certification that it has provided service of the Answering Submission to counsel for WCX as well as courtesy copies to the Commission's Enforcement Bureau.

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TAB 1

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

ANSWER TO AMENDED COMPLAINT

AT&T Mobility LLC ("AT&T") submits this Answer (the "Answer") to the Amended Complaint filed by Worldcall Interconnect, Inc. ("WCX") (together with AT&T, the "Parties"), on October 1, 2014 (the "Amended Complaint")[1], in the above-captioned proceeding before the Federal Communications Commission (the "Commission").

I. INTRODUCTION

WCX's Amended Complaint[2] and other submissions evidence a profound misunderstanding of the applicable law, provide a flawed and one-sided account of the Parties' negotiations, and mischaracterize the nature and intent of AT&T's proposed terms and conditions. The Commission carefully crafted its data roaming rules to balance two important goals: ensuring that mobile wireless providers can obtain data roaming arrangements on "commercially reasonable" terms, but also preserving incentives to invest in broadband networks. WCX, by contrast, insists that AT&T must offer (i) sub-penny roaming rates tied to "prevailing" retail rates that are far below the rates found in all other presumptively reasonable marketplace roaming agreements, (ii) unbounded use of AT&T's network for "roaming" that WCX will only "endeavor" to keep below 50% of all of its traffic, and (iii) elimination of all audit, service suspension, and other standard contract rights to enforce that minimal "limit." In other words, WCX seeks complete license to engage in the very backdoor resale of AT&T's network and services nationwide that the data roaming rules were designed to prevent. WCX's

[1] As a result of an agreement between the parties, WCX is going to file a Second Amended Complaint. Pursuant to the agreement, the Second Amended Complaint will include revisions to ¶¶ 65, 73, 75, 77, 86, 87 and 91 of the complaint itself and ¶ 14(c) of the Supplemental Declaration of Lowell Feldman. The revisions address certain confidentiality concerns that AT&T had raised regarding the above identified paragraphs; the substance of WCX's allegations has not changed. Because the Second Amended Complaint has not yet been filed, AT&T refers in this Answering Submission to the Amended Complaint and its citations are to the Amended Complaint. However, both its responses and its citations apply equally to the allegations of the Second Amended Complaint.

[2] WCX's Amended Complaint seeks a finding that AT&T's proposed data roaming agreement is not commercially reasonable and requests entry of an Order directing AT&T to provide data roaming services to WCX pursuant to the terms and conditions set forth in the Rural Wireless Association's (the "RWA") model data roaming agreement (the "RWA Model Agreement"). Am. Compl. ¶ 94.

contention that the rules *require* AT&T to offer such one-sided terms is starkly inconsistent with the *Data Roaming Order* and, indeed, would rewrite those rules in ways that would undermine the Commission's well-established broadband policies.

The *Data Roaming Order* requires "facilities-based providers of commercial mobile data services to offer data roaming arrangements to other such providers on commercially reasonable terms and conditions, subject to certain limitations."[3] The broadband data services at issue here are not common carrier services, and Section 332(c) prohibits the Commission from treating such services as common carrier services.[4] In recognition of those limitations, the Commission deliberately chose *not* to apply the Title II just and reasonable standard to wholesale data roaming arrangements, and it insisted that "we here *reject* – rather than determine how to enforce – a common carriage requirement of 'just and reasonable' rates, terms, and conditions."[5]

The commercial reasonableness standard is thus intended to be exceptionally flexible and necessarily allows for a broader range of outcomes than the "just and reasonable" ratemaking standard of common carriage regulation which itself contemplates a range, or "zone," of acceptable rates.[6] The rules thus allow providers wide latitude in negotiating agreements, and the Commission has held that particular disputes will be resolved "based on the totality of the circumstances," including but not limited to seventeen factors enumerated in the *Data Roaming*

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[3] Second Report and Order, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Mobile Data* Services, 26 FCC Rec. 5411 ¶ 1 (2011) (the "*Data Roaming Order*") (emphasis added).

[4] 47 U.S.C. § 332(c)(2) & (d); *Cellco P'ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012) ("mobile-data providers are statutorily immune, perhaps twice over, from treatment as common carriers").

[5] *Data Roaming Order* ¶ 68 n.198 (emphasis added).

[6] *FPC v. Conway Corp.*, 426 U.S. 271, 278 (1976) ("there is no single cost-recovering rate, but a zone of reasonableness: statutory reasonableness is an abstract quality represented by an area, rather than a pinpoint" (internal quotation marks omitted)); 47 U.S.C. § 201.

Order.[7] Of course, the best evidence of reasonableness is the rates and terms that have been negotiated at arm's length in the commercial marketplace. When rates and terms are directly observable in the marketplace (as they are here[8]), and broadband data providers are competing successfully in reliance on those rates and terms (which also is the case[9]), then any offer that is generally consistent with such rates and terms should be "commercially reasonable" within the meaning of the Commission's rule.[10] Indeed, the Commission has indicated that signed marketplace agreements that have never been challenged will be *presumed* to be commercially reasonable.[11]

Equally important, the Commission has specifically held that requesting carriers cannot use data roaming obligations "as a backdoor way to create *de facto* mandatory resale obligations."[12] The Commission expressly recognized this as a danger, noting that data roaming requirements raise "the possibility that requesting providers will substitute roaming for investment in coverage and accordingly under-invest in deploying new infrastructure."[13] To

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[7] *Data Roaming Order* ¶¶ 74, 86.

[8] *See* Meadors Decl. ¶¶ 47-49; Orszag Decl. ¶¶ 10, 15-18, 28-29, 32-33, 35-37, 39-42, 49-54, 58-66, 74, 79-80, 89, 92-93, 98-100, 114.

[9] Orszag Decl. ¶¶ 10, 12-18, 28-29, 37, 39-40, 49-54, 58-66, 74, 79-80, 89, 114.

[10] *See, e.g.*, *Matthews v. Wis. Energy Corp.*, 642 F.3d 565, 572 (7th Cir. 2011) ("A willingness to pay is an indication of commercial reasonableness.").

[11] *See 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.").

[12] *Data Roaming Order* ¶ 88; *see also id.* ¶ 41 n.122 ("As we have stated in the past, however, roaming arrangements cannot be used as a backdoor way to create *de facto* mandatory resale obligations."); *id.* ¶ 34 ("we provide that the data roaming obligation does not create mandatory resale obligations").

[13] *Data Roaming Order* ¶ 34; *see also id.* ¶ 21 n.76 (recognizing also that "there are pro-competitive benefits that flow from carriers differentiating themselves on the basis of coverage," and thus host providers may have a disincentive to invest in their networks if other providers can "free-ride" on their investment via roaming"); *see also id.* ¶¶ 16-22, 33-34.

eliminate that possibility, the Commission explained in the *Data Roaming Order* that roaming rates ordinarily should substantially exceed retail rates to avoid undermining incentives for facilities-based build-out: "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 carrier's network."[14] And the Commission has previously expressly rejected arguments that retail rates should be used as a "benchmark" for evaluating the reasonableness of roaming rates.[15]

As the complainant, WCX bears the burden of demonstrating that AT&T's proposed terms and conditions are not commercially reasonable under the requirements set forth in the Commission's *Data Roaming Order*.[16] As the Commission explained, the *Data Roaming Order* "*allows host providers to control the terms and conditions* of proffered data roaming agreements" so long as such terms and conditions are "commercially reasonable."[17] Consequently, the Commission need only find that the host provider has offered commercially-reasonable terms and conditions to conclude that the provider complied with the requirements of the *Data Roaming Order*.

WCX cannot carry its burden in this case because the AT&T proposal is plainly commercially reasonable. The AT&T proposal incorporates standard terms and conditions forged in "dozens of actual commercial negotiations with other wireless carriers" and in many

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[14] *Data Roaming Order* ¶ 21; *see also id.* ¶ 51 ("As discussed above, the relatively high price of roaming compared to providing facilities-based service will often be sufficient to counterbalance the incentive to scale back deployments in favor or relying on another provider's network.").

[15] *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817, n.102 ¶¶ 36-40 (2007); *see also* Order on Reconsideration and Second Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 25 FCC Rcd. 4181 ¶ 32 n.90 (2010) ("*Voice Roaming Order on Reconsideration*") (fact that "roaming rates [are] *much higher* than retail rates" would preserve investment incentives) (emphasis added).

[16] *See, e.g., Shahin v. Verizon Delaware LLC*, 29 FCC Rcd. 4200 ¶ 4 (2014) ("In a formal complaint proceeding under Section 208 of the Act, the complainant bears the burden of proof.").

[17] *Data Roaming Order* ¶ 33 (emphasis added).

cases based on GSMA provisions.[18] Consistent with the commercial reasonableness standard, the AT&T proposal ensures that WCX's consumers have "seamless [data roaming] coverage nationwide" while maintaining incentives for WCX to invest in its own wireless network facilities.[19] The rates and terms that AT&T has proposed are consistent with—and, in a number of respects, better than—the rates and terms contained in numerous marketplace agreements that AT&T has entered into with other providers.[20] The rates and terms in those agreements are not preventing those providers from offering competitive services and investing in their networks.[21] And, those agreements have not been challenged and are presumptively commercially reasonable.[22]

WCX does not deny that AT&T proposes industry-standard terms and conditions. Instead, it contends that the Commission's rules somehow obligate AT&T to offer WCX far greater benefits than it provides to its other domestic roaming partners. In particular, WCX challenges (i) the rates AT&T has proposed, because they are higher than "retail" rates, and (ii) AT&T's proposed usage restrictions, which ensure that WCX does not use these roaming services as *de facto* resale.[23] WCX also challenges a smattering of other standard provisions in AT&T's proposal, such as the audit and termination provisions, and includes a variety of other statutory claims.[24] The Commission should reject all of WCX's arguments.

First, AT&T's proposed rates are consistent with other marketplace agreements and are therefore commercially reasonable. Indeed, AT&T's proposed roaming rates represent

[18] Meadors Decl. ¶ 30; *see also* Orszag Decl. ¶¶ 10, 35, 37, 39.

[19] *See* Meadors Decl. ¶¶ 37-71; Orszag Decl. ¶¶ 10, 13, 20-24, 28 83-85; *Data Roaming Order* ¶ 9.

[20] *See* Meadors Decl. ¶¶ 47-49; Orszag Decl. ¶¶ 10, 35, 37, 39, 49-53, 58-61, 66.

[21] *See* Orszag Decl. ¶¶ 10, 12-18, 20-24, 37, 39-41, 49-54, 58-66, 74, 83-85, 89, 114.

[22] *See Data Roaming Order* ¶ 81.

[23] *See, e.g.*, Am. Compl. ¶¶ 46-60 (usage restrictions), 92-93 (roaming rates).

[24] *See* Am. Compl. ¶¶ 69-91.

significant discounts on the average rate AT&T pays for data roaming pursuant to its data roaming agreements with other wireless providers.[25] Although WCX argues that the rules require AT&T to propose rates that are no higher than retail rates,[26] in fact the Commission has expressly rejected retail rates as a benchmark for wholesale roaming rates, and has indicated that it expects roaming rates to be "*much higher* than retail rates"[27] in order to "counterbalance the incentive" to "rely[] on another provider's network."[28]

Similarly, AT&T's proposed usage restrictions are commercially reasonable and, indeed, standard.[29] Contrary to WCX's claims, the Commission has expressly held that requesting providers like WCX may not use data roaming as "a backdoor way to create *de facto* mandatory resale obligations."[30] AT&T thus has every right under the rules to propose terms that seek to protect its investment in its network from backdoor resale. These provisions are not intended to, and do not, prevent ordinary roaming outside the requesting provider's network, and AT&T has been willing to negotiate the precise limits of these restrictions to meet the legitimate roaming needs of its various partners.[31]

Indeed, WCX's real intentions are clear from its counterproposal, the RWA Model Agreement, which contains patently unreasonable terms and conditions. AT&T understands that

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[25] Meadors Decl. ¶¶ 47-49; Orszag Decl. ¶¶ 10, 48-54, 64-65.

[26] *See* Am. Compl. ¶¶ 92-93.

[27] *Voice Roaming Order on Reconsideration* ¶ 32 n.90 (emphasis added).

[28] *Data Roaming Order* ¶ 51; *see also id.* ¶ 21 ("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 carrier's network"); *see also* Report and Order and Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817, n.102 ¶¶ 36-40 (2007) (specifically rejecting cap "based on some benchmark of retail rates").

[29] Meadors Decl. ¶ 38-46; Orszag Decl. ¶¶ 10, 55-62, 66.

[30] *Data Roaming Order* ¶ 88; *see also id.* ¶ 41 n.122 ("As we have stated in the past, however, roaming arrangements cannot be used as a backdoor way to create *de facto* mandatory resale obligations."); *id.* ¶ 34 ("we provide that the data roaming obligation does not create mandatory resale obligations").

[31] Meadors Decl. ¶ 45.

the RWA Model Agreement is the result of discussions between like-minded rural wireless providers belonging to a committee chaired by WCX's principal, Lowell Feldman.[32] Both in its original form and as amended, the RWA Model Agreement is plainly inconsistent with the *Data Roaming Order*. For example, while the Commission explicitly declined to "create mandatory resale obligations,"[33] the RWA Model Agreement prohibits any restrictions on resale.[34] Whereas the Commission recognized that reasonable "limitations" on roaming could prevent requesting providers from "rely[ing] on roaming agreements in place of network deployment,"[35] the RWA Model Agreement provides no meaningful usage restrictions whatsoever.[36] The RWA Model Agreement also proposes a roaming rate that is significantly below the prevailing market price for wholesale roaming[37] despite the Commission's pronouncement—which WCX disregards as "irrelevant"[38]—that "relatively high" roaming rates provide incentives for wireless providers to invest in their own networks.[39] As noted above, however, WCX's proposal is not the focus of this proceeding. AT&T is in compliance with the *Data Roaming Order* because its own proposal is commercially reasonable.[40]

WCX makes a number of other claims in support of the Amended Complaint that are also baseless. For example, it asserts that, unless the Commission forces AT&T to provide data

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[32] Meadors Decl. ¶ 72.

[33] *Data Roaming Order* ¶ 34.

[34] *See* RWA Model Agreement § 5 (prohibiting AT&T from "limit[ing] or condition[ing] . . . roaming in any manner that prohibits or diminishes the ability of [WCX] to . . . act as a wholesaler of [roaming services] or provide access to [roaming services] to [r]esellers").

[35] *Data Roaming Order* ¶ 21.

[36] *See* RWA Model Agreement § 5 (stating only that each Party will "endeavor to provide the majority of its customers' mobile data services on its own [n]etwork"); Meadors Decl. ¶ 73.

[37] *See* RWA Model Agreement, Ex. 2 (data roaming rate of 0.96¢/MB): *see also* Meadors Decl. ¶¶ 47-49, 75; Orszag Decl. ¶¶ 78-82, 89.

[38] *See* Roetter Conf. Decl.

[39] *Data Roaming Order* ¶ 21; Meadors Decl. ¶¶ 50-51; Orszag Decl. ¶¶ 10, 20-24, 28 83-85.

[40] *See Data Roaming Order* ¶ 3.

roaming on WCX's one-sided terms, WCX as a rural provider will not be able to offer a competitive service, particularly a service supporting Machine-to-Machine devices.[41] As noted above, AT&T has numerous agreements with other rural providers that have terms substantially the same as the AT&T proposal here, and those rural providers are able to offer service and invest in their networks.[42] WCX's real claim is that the Commission's data roaming rules somehow guarantee it a roaming agreement that would facilitate its business plan, which clearly envisions offering service throughout the nation and providing half or more of its traffic via "roaming" on AT&T's network at rates equivalent to retail rates. WCX's proposed business plan is a classic of example of resale, not roaming, and the Commission has expressly held that host providers do not have to offer data roaming on terms that are tantamount to "backdoor" resale.[43]

In addition, WCX challenges various other terms in the AT&T proposal, such as the suspension and termination provisions,[44] that would allow AT&T to enforce the agreement's provisions that ensure that WCX does not use these data roaming services as *de facto* resale. Such terms are standard in all of AT&T's roaming agreements,[45] and insofar as these provisions support AT&T's efforts to protect against backdoor resale, they are plainly commercially reasonable. But such provisions are especially reasonable as they relate to WCX in particular. Mr. Feldman and the Worldcall family of companies are frequent litigants in intercarrier disputes at the Commission, in the courts, and before state public utility commissions.[46] In the past,

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[41] Am. Compl. ¶ 28.

[42] *See also* Meadors Decl. ¶ 51; Orszag Decl. ¶¶ 10, 16-17, 39, 52, 89, 106, 115.

[43] *See Data Roaming Order* ¶ 41 n.122.

[44] Am. Compl. ¶¶ 69-91.

[45] Meadors Decl. ¶¶ 53-62; *see also* Orszag Decl. ¶ 66.

[46] Meadors Decl. ¶ 12; *id.*, Exs. 3-4.

AT&T has had to litigate payment disputes with Mr. Feldman's other companies, and provisions like the audit provision were included in the AT&T proposal in an attempt to avoid the expense of further dispute resolution.[47]

Recognizing that it has not stated a claim under the Commission's data roaming rules, WCX's Amended Complaint includes a grab bag of additional claims under a variety of provisions across the Communications Act.[48] None has merit. For example, WCX argues that AT&T is actually obligated to provide WCX roaming on a common carrier basis under the *voice* roaming rules, on the theory that some of WCX's traffic may be Voice over Internet Protocol ("VoIP") traffic.[49] That claim is frivolous: WCX has not sought access to AT&T's voice network that is interconnected with the public switched telephone network, and WCX concedes that it will provide all traffic under its proposed agreement as data packets such that "[t]o AT&T it will be no different than when WCX's customer is surfing the web or receiving an e-mail."[50] For the same reasons, Sections 201, 202, and 332 are inapplicable, as they govern common carrier services.[51] Section 301 merely states the purposes of Title III; it does not establish any substantive obligations.[52] And Section 1302, which authorizes the Commission to take steps to encourage broadband investment, does not provide a cause of action under either Section 208 (which governs only common carrier services) or the data roaming rules (because the

[47] Meadors Decl. ¶ 54.

[48] *See* Am. Compl. ¶ 41.

[49] *See* Am. Compl. ¶ 5.

[50] WCX Legal Analysis at 271-72; *see* Legal Analysis in Support of AT&T's Answer (Nov. 5, 2014) ("Legal Analysis"), Introduction and Summary, § III(A).

[51] *See* Legal Analysis, § III(A).

[52] *See* Legal Analysis, § III(B)(1).

Commission created no parallel complaint procedure for such claims in the *Data Roaming Order*).[53]

In sum, AT&T remains willing to negotiate with WCX to address its concerns.[54] But WCX has never made any serious effort to negotiate these issues with AT&T within the framework of the Commission's rules. Instead, after abandoning negotiations with AT&T for over two years, WCX demanded that AT&T accept its radically one-sided RWA Model Agreement, which had never been the basis for any agreement adopted in the marketplace. WCX threatened from the beginning to bring a test-case before the Commission unless AT&T accepted WCX's demands.[55] WCX's purpose thus has been to bring litigation in an attempt to press its patently erroneous interpretations of the data roaming rules. WCX's position here is in actuality an attempt to rewrite the data roaming rules in ways that the Commission expressly rejected in the *Data Roaming Order*, and its complaint is not an appropriate vehicle for such changes to the rules.

The remainder of this Answer provides AT&T's point-by-point responses to the allegations contained in the Amended Complaint. In addition to the accompanying Legal Analysis, AT&T is also filing three declarations. The Declaration of Gram Meadors ("Meadors Declaration") provides the detailed facts concerning AT&T's history of negotiations with WCX and explains the purpose behind the disputed provisions in the AT&T proposal.[56] The Declaration of Michael Prise ("Prise Declaration") rebuts WCX's contention that AT&T is a "must have" roaming partner; with the advent of LTE, WCX has a number of potential roaming

[53] *See* Legal Analysis § III(B)(2).

[54] *See* Section IV (AT&T's Proposed Data Roaming Agreement), *infra*.; Meadors Decl. ¶ 80.

[55] Meadors Decl. ¶ 22.

[56] *See generally* Meadors Decl.

partners.[57] Finally, Jonathan Orszag, an economic expert, explains in his declaration ("Orszag Declaration") that AT&T's proposals are reasonably designed to promote roaming while also guarding against the use of these services as *de facto* resale that would eliminate incentives for WCX to invest in its own broadband facilities and are commercially reasonable.[58]

ANSWER TO ALLEGATIONS IN AMENDED COMPLAINT

Set forth below are AT&T's specific responses to the numbered paragraphs set forth in WCX's Amended Complaint. As initially filed, WCX's Complaint did not include any evidentiary support for its various factual claims and, for this reason, AT&T moved to strike the complaint on procedural grounds.[59] By letter order dated September 18, 2014, the Commission found that the complaint failed to comply with the Commission's formal complaint rules and directed WCX to amend its complaint to bring it into compliance with the rules.[60]

On October 2, 2014, WCX filed its Amended Complaint, which purports to include "specific citations for each factual assertion."[61] While WCX has provided citations for many of the allegations in its Amended Complaint, those citations often consist of declarations by Mr. Feldman parroting the language in WCX's Amended Complaint. Seldom is documentary support provided to substantiate Mr. Feldman's claims, many of which are simply broad, categorical pronouncements. WCX also cites in support of certain of its allegations, the declarations of its expert witness, Dr. Martyn Roetter. Like Mr. Feldman's declarations, many of the assertions in Dr. Roetter's declarations are not supported by documentary or other evidence.

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[57] *See* Prise Decl. ¶¶ 1-2, 6-16.

[58] *See generally* Orszag Decl.

[59] Mot. of AT&T Mobility to Strike the Formal Compl. for Substantial Violations of the Comm'n's Pleading Rules, File No. EB-14-MD-001 (Sept. 10, 2014) ("Motion").

[60] Letter from Lisa Saks to W. Scott McCollough and David L. Lawson, *Worldcall Interconnect, Inc. v. AT&T Mobility, LLC*, File No. EB-14-MD-011 (Sept. 18, 2014).

[61] Letter from M. Henry to L. Saks and L. Boehley (Cc: D. Lawson), *Worldcall Interconnect, Inc. v. AT&T Mobility, LLC*, File No. EB-14-MD-011 (Oct. 1, 2014).

WCX's failure to substantiate many of the broad, categorical claims in the declarations of Mr. Feldman and Dr. Roetter, coupled with the fact that certain of WCX's claims still do not appear to be supported by any citation, has complicated the task of responding to WCX's Amended Complaint on a point-to-point basis. Any claims that are not specifically addressed are denied.

1. AT&T admits that WCX is a Texas corporation headquartered at 1250 South Capital of Texas Highway, Bldg. 2-235, West Lake Hills, TX 78746, and that its phone number is 512.888.2311. AT&T further acknowledges that WCX has claimed that it "provides wireless mobile services in certain portions of Texas using its licensed 700MHz frequencies," but notes that WCX has not presented any documentary evidence substantiating that claim or providing details as to the nature and extent of the services it purportedly provides. AT&T admits that WCX has a non-exclusive license to provide "wireless services using 3650 frequency . . . on a nationwide basis." Consequently, that claim is denied.

2. Admit.

3. Admit.

4. AT&T notes that the allegations in this paragraph purport to summarize certain regulatory requirements relating to roaming. AT&T states that a more complete description of those requirements is set forth in the Commission's regulations and decisions. With that caveat, AT&T admits that the Commission first addressed roaming in 1981 and that it has specified rules regarding "automatic roaming," which are applicable to "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 provider to re-use frequencies and accomplish seamless hand-

offs of subscriber calls."[62] AT&T further admits that the FCC has mandated that automatic roaming for "interconnected" services, as well as certain push-to-talk and text-messaging services, must be offered upon reasonable request on terms and conditions that are just, reasonable, and nondiscriminatory.[63] AT&T also admits that roaming with respect to broadband data services is not subject to Title II, but rather a "commercial reasonableness" standard.[64] AT&T denies the remaining allegations in this paragraph as mischaracterizing or oversimplifying the regulatory regime.

5. AT&T denies that the Commission's differing legal standards with respect to data roaming "obscure[ ] the fact that small, rural providers do not have extensive home area footprints or a nationwide network." The Commission has explained the differing legal standards for these services in its regulations and decisions. The justifications for these differences have nothing to do with the size of rural providers' home networks.[65] Further, the possible impact that differing legal standards may have on a rural provider's ability "to support their users when they travel about and want to enjoy the full suite of capabilities within their wireless service, both 'non-interconnected' broadband data and interconnected voice and data capabilities," is not properly at issue in this complaint proceeding.[66] AT&T further notes that WCX has not presented any specific evidence supporting its claims in this regard, particularly as they apply to WCX's customers. Indeed, WCX has presented no specific information about its customers, or about the services that it alleges that it provides to its customers. Consequently,

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[62] 47 C.F.R. § 20.12(a)(2).

[63] *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817, n.102 ¶¶ 36-40 (2007).

[64] *See* Legal Analysis, Introduction and Summary, § III(a).

[65] *See* Legal Analysis § I; *see also* Meadors Decl. ¶ 64.

[66] *See* Legal Analysis § I.

AT&T does not have sufficient information to admit or deny these claims and, for this reason, AT&T denies WCX's claims that it "uses new technology, called Voice over Long Term Evolution (VoLTE)," or that it offers "interconnected" data and text-messaging to customers that is "technically supported through IP-based higher-layer 'applications.'" AT&T admits that VoLTE is a "developing standard which incorporates the advancements of Voice over Internet Protocol ('VoIP') into a managed LTE data network." WCX further asserts that if a WCX user were to use a "WCX-supported interconnected voice, data or text-messaging service while roaming on AT&T's network," then the transmission would "look like [to AT&T] regular non-interconnected broadband data." WCX does not provide any specifics regarding the nature of its services. Consequently, AT&T is without sufficient information to admit or deny these allegations and, for this reason, they are denied. The remaining allegations of this paragraph constitute argument, which AT&T denies.

6. Other than broad, categorical pronouncements by its declarants, WCX does not provide any evidentiary support for its claim that any provider "that wishes to innovate in the emerging markets known as Machine-to-Machine ('M2M'), and 'Internet of Things' must [ ] have access to support their customers throughout the nation" or that "[r]oaming is imperative, an absolute prerequisite to a small rural provider's ability to attract and retain customers at all." Consequently, AT&T does not have sufficient information to admit or deny this claim and, for this reason, AT&T denies the claim. AT&T further takes issue with WCX's claim that a "roaming agreement with AT&T is a fundamental 'must-have' for any small rural provider that offers GSM or LTE-based service." AT&T notes that the broadband data market is highly competitive and multiple alternatives exist to AT&T's network, both in the service areas adjacent

to WCX's service area as well as nationally.[67] AT&T also denies that because "WCX is solely LTE-based, [ ] its options are limited to LTE networks using compatible technology and frequencies." That simply is not the case.[68] AT&T also disputes WCX's claims that "small, rural provider[s] must be in position to offer service on terms that are comparable to those offered by the larger nationwide providers," that the provision of innovative services by rural providers is necessarily dependent on the terms and conditions of an "underlying roaming agreement," or that "[t]he terms, conditions and prices must allow the rural provider to offer nationwide, innovative and cutting-edge services, or else their services will not be purchased by those residing in or having a significant connection to the small provider's home area." Again, other than the broad, categorical pronouncements by its witnesses, WCX does not offer any specific evidence to support these claims. Consequently, AT&T does not have sufficient information to admit or deny these claims and, for this reason, AT&T denies them. AT&T further notes that the Commission's *Data Roaming Order* was not designed for these purposes.[69] AT&T notes that the remaining allegations of this paragraph constitute argument, which AT&T denies.

7. WCX makes a number of broad, categorical statements in this paragraph as to the dynamics underlying the development of application software. WCX further argues that "the 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." While AT&T admits that "the marketplace for 'mobile apps' (short for 'application software') is currently vibrant and

[67] *See* Orszag Decl. ¶¶ 7, 10, 14-18, 42, 45, 62, 114; Prise Decl. ¶¶ 1-2, 6-16.

[68] *See* Prise Decl. ¶¶ 1-2, 6-16; Orszag Decl. ¶¶ 7, 10, 18, 42-45, 62; *Data Roaming Order* ¶ 46.

[69] *See* Legal Analysis § I; *see also Data Roaming Order* ¶ 1.

competitive," it takes issue with WCX's claim that "[t]he main driver for most of these 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." Other than the claims of its principal, WCX does not provide any evidence to support this claim or its other claims (also related to apps). Consequently, AT&T does not have sufficient information to admit or deny these claims and, for this reason, AT&T denies them. Further, AT&T denies that the Commission's *Data Roaming Order* was designed to facilitate the ability of providers, whether large or small, to utilize the networks of other providers to "offer a full suite, all-coverage service to technology developers."[70]

8. AT&T lacks sufficient information to assess WCX's claim that undefined "new services and capabilities . . . have the potential to dramatically impact agricultural, environmental, medical, educational and shipping industries among others"; consequently, AT&T does not have sufficient information to admit or deny this claim and, for this reason, AT&T denies the claim. AT&T admits that "M2M and 'Internet of Things' projects" can "involve multiple connected devices per each individual user or company" and that such projects can be "designed and developed by innovative entrepreneurial companies and individuals."

9. Other than the claims of its principal, WCX does not provide any evidence to support its broad, categorical pronouncements. Consequently, AT&T does not have sufficient information to admit or deny these claims and, for this reason, AT&T denies that application and device developers necessarily "assume (1) an open and flexible nationwide (and worldwide) environment for their product and its method of collecting, processing and using data; (2) the capability or device can be used in a ubiquitous fashion and on any underlying transmission

[70] *See* Legal Analysis § I; Meadors Decl. ¶¶ 40-41; Orszag Decl. ¶¶ 10, 21-24, 31, 56; *see also Data Roaming Order* ¶¶ 1, 21.

network; and (3) will often have a cost per month per device measured in pennies or a fraction of pennies." AT&T further denies that the Commission's *Data Roaming Order* was designed to facilitate the ability of providers, whether large or small, to utilize the networks of other providers to "offer a full suite, all-coverage service to technology developers."[71]

10. AT&T denies that "[l]arge 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." The only support that WCX provides for these categorical statements are citations to two Commission orders from 1996. AT&T further denies that it has such an incentive, or that it has taken any actions consistent with such an incentive.[72]

11. AT&T admits that "WCX proposes to use the RWA Model Agreement as the contract terms between AT&T and WCX." AT&T further admits that the RWA Model Agreement contains provisions that address both the use of roaming service in connection with M2M and "Internet of Things" applications as well as the rate to be paid for roaming service. AT&T denies WCX's characterization of those provisions and states that the terms of the RWA Model Agreement speak for themselves. AT&T also denies WCX's assertion that the RWA Model Agreement's price provision "guarantees" that "AT&T will in fact earn more profits from WCX roaming than AT&T obtains from its own retail customers," or that the price provision reflects a "prevailing retail price for [WCX's] use of AT&T's network."[73] AT&T further denies

[71] *See* Legal Analysis § I; Orszag Decl. ¶¶ 10, 21-24, 31, 56; *see also Data Roaming Order* ¶ 1.

[72] *See* Meadors Decl. ¶¶ 40-41; Orszag Decl. ¶¶ 15, 46, 52, 114-15.

[73] *See* Orszag Decl. ¶¶ 10, 64-65, 78-87, 89.

that such considerations are among the relevant criteria for assessing commercial reasonableness.[74]

12. AT&T admits that the proposed data roaming agreement that it has presented to WCX contains provisions that address both WCX's use of AT&T's roaming service and the rates to be charged for such service. AT&T denies, however, WCX's characterizations of those provisions or any suggestion that they are not commercially reasonable.[75] AT&T further denies that the Commission's *Data Roaming Order* was designed to facilitate WCX's market entry as a provider of roaming-capable M2M or "Internet of Things" devices and services.[76] AT&T also denies that "[t]he result of AT&T's terms, if adopted, is that unless a carrier already has a ubiquitous network, it simply may not participate in these new markets as an innovator." Other than categorical statements from its witnesses, WCX offers no evidence in support of that statement. Further, this point is not consistent with the fact that there are numerous providers without ubiquitous networks that participate in such markets.[77] AT&T also denies WCX's claim that "AT&T's terms would force users in rural areas to use a national carrier such as AT&T rather than a home-based provider with ties to their community." Other than the testimony of its principal, WCX offers no evidence in support of this assertion. In addition, this assertion is contradicted by the fact that users in rural areas use providers other than national providers.[78]

13. AT&T denies that it "has every incentive to make its smaller competitors less attractive to customers by reducing those customers' ability to roam if they do not sign on as

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[74] *See* Legal Analysis § I; Orszag Decl. ¶¶ 20-24, 27-30, 88-94.

[75] *See* Legal Analysis § II; Meadors Decl. ¶¶ 38-51; Orszag Decl. ¶¶ 35-62.

[76] *See* Legal Analysis § I; Orszag Decl. ¶¶ 35-62.

[77] *See* Meadors Decl. ¶¶ 13-14; Orszag Decl. ¶¶ 10, 12-17, 46, 52, 89, 115.

[78] *See* Meadors Decl. ¶ 13; Orszag Decl. ¶¶ 15-18, 46, 52, 89, 115.

AT&T Mobility retail customers."[79] AT&T further denies that in the absence of "Section 20.12 of the Commission's rules requiring it to provide roaming, AT&T Mobility would have no reason to offer roaming to WCX, and in fact has every incentive to deny roaming on any terms, much less on reasonable terms." Those allegations find no support in the record and neither has any credibility.[80]

14. Other than the testimony of its principal, WCX provides no evidentiary support for the broad, categorical statements contained in this paragraph. While AT&T admits that the marketplace for wireless services has changed over time and that wireless providers often do not charge their customers an additional, incremental fee for roaming (up to some specified limit), AT&T denies that "a carrier *must* offer nationwide domestic roaming that has no additional incremental fee, or in the case of M2M and 'Internet of Things' is no more than the prevailing retail rate for in-home usage."[81] (emphasis added). Indeed, WCX's allegation is inconsistent with the *Data Roaming Order*, which provides that "the relatively high price of roaming compared to providing facilities-based services will often be sufficient to counterbalance the incentive to 'piggy back' on another carrier's network."[82] AT&T further denies 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." (emphasis added). Under the *Data Roaming Order*, the parties have significant flexibility in how they structure their relationships.[83]

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[79] *See* Orszag Decl. ¶¶ 10, 17, 39, 46, 52, 89, 106, 114-15.

[80] *See* Orszag Decl. ¶¶ 10, 16-17, 39, 46, 52, 89, 106, 114-15.

[81] *See* Orszag Decl. ¶¶ 10, 14-16, 20-24, 28, 63-65, 83-85.

[82] *Data Roaming Order* ¶ 21.

[83] *See, e.g.*, Data *Roaming Order* ¶ 45.

15. AT&T admits that "[b]roadband data is not interconnected [to the public switched network], is not CMRS and is not [governed by] Title II [of the Communications Act]." The remaining allegations of this paragraph principally set forth WCX's views regarding the Commission's *Data Roaming Order* and, more particularly, the Commission's adoption of a commercial reasonableness standard. AT&T disputes WCX's characterization of that Order, which speaks for itself. AT&T's position regarding these matters is set forth in greater detail in its Legal Analysis.[84]

16. WCX's allegations in this paragraph relate principally to WCX's views regarding the Commission's commercial reasonableness standard. AT&T disputes and denies WCX's characterization of that legal standard. AT&T's position regarding these matters is set forth in greater detail in its Legal Analysis.[85]

17. Other than a statement to that effect by its principal, WCX offers no evidentiary support for its assertion that "roaming terms that are financially, practically and operationally unsustainable to the small, rural carrier are not measurably different from having no roaming at all." WCX makes no effort to tie that vague claim to the issues presented here. Consequently, AT&T does not have sufficient information to admit or deny this claim and, for this reason, AT&T denies the claim. AT&T further denies that "WCX has offered commercially reasonable terms."[86] AT&T also denies that it "has insisted on roaming terms that are demonstrably not commercially reasonable, are not reasonable and are unreasonably discriminatory, at least with regard to WCX" or that its "terms are so unreasonable, onerous and adhesive that they are tantamount to a refusal to offer roaming at all." As explained in greater detail in other parts of

[84] *See* Legal Analysis § I.

[85] *See* Legal Analysis § I.

[86] *See* Legal Analysis § II; Meadors Decl. ¶¶ 72-79; Orszag Decl. ¶¶ 10, 19-34, 67-106.

this submission, the terms and conditions that AT&T has proposed are commercially reasonable.[87]

18. The allegations of this paragraph relate to WCX's claim that the broadband data roaming service at issue in this proceeding is subject to Commission Rule 20.12 (a)(2) and (d). AT&T denies that allegation.[88] AT&T also rejects WCX's statement regarding what AT&T "must offer" under the Commission's rules. To the extent WCX is characterizing the Commission's rules, AT&T states that those rules speak for themselves. AT&T's position on these legal issues is set forth in greater detail in its Legal Analysis.[89]

19. The allegations of this paragraph also relate to WCX's claim that the broadband data roaming service at issue in this proceeding is somehow subject to Commission Rule 20.12 (a)(2) and (d). WCX asserts, without providing any evidentiary support (other than broad general assertions by its principal), that it is "a technologically compatible, facilities-based CMRS carrier" and that it "offers 'interconnected' voice and data." WCX further claims, again without citing any hard evidence, that it "offers text-messaging" and that it "intends to enter 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.'" Because WCX has not provided any documentary support for these claims, AT&T is not in position to admit or deny them. Consequently, they are denied. WCX further characterizes certain recent Commission decisions and the obligations they may impose on WCX. As to those

[87] *See* Legal Analysis § II; Meadors Decl. ¶¶ 37-71; Orszag Decl. ¶¶ 10, 19-34, 35-66.

[88] *See* Legal Analysis, Introduction and Summary, § III(a).

[89] *See* Legal Analysis, Introduction and Summary, § III.

decisions, AT&T admits that under the Commission's "recent 'text to 911' decision, [providers of text messaging] will have additional duties, including some fairly exacting geolocation responsibilities." AT&T further admits that the Commission has imposed "new obligations to 'over the top' (OTT) 'interconnected' text providers" and that such providers "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.'" AT&T, however, denies that WCX's provision of such services—if it in fact WCX provides such services—would "subject" a broadband data roaming service used to transmit data associated with such services to regulation under Commission Rule 20.12(d). AT&T's position on this legal issue is set forth in greater detail in its Legal Analysis.[90]

20. AT&T denies that its "proposed terms must [ ] be assessed through a Title II 'just, reasonable and nondiscriminatory' lens."[91] As explained in greater detail in AT&T's Legal Analysis, neither sections 201 and 202 nor rule 20.12(a)(2) and (d) apply to the broadband data roaming services at issue in this proceeding.[92]

21. WCX has not presented any documentary support for its allegation that it "will be using roaming to provide 'interconnected' voice and data services along with text-messaging." Consequently, AT&T does not have sufficient information to admit or deny this allegation and, for this reason, that allegation is denied. AT&T further denies that sections 201 and 202 and rule

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[90] *See* Legal Analysis, Introduction and Summary, § III.

[91] *See* Legal Analysis § III; *see also Data Roaming Order* ¶ 68 ("the data roaming rules . . . do not amount to treating mobile data service providers as 'common carriers' under the Act"); *Cellco*, 700 F.3d at 541.

[92] *See* Legal Analysis § III(A); *see also Data Roaming Order* ¶ 68 ("The rule we adopt will allow individualized service agreements and will not require providers to serve all comers indifferently on the same terms and conditions"); *Cellco*, 700 F.3d at 541.

20.12(d) apply to the broadband data roaming services at issue in this proceeding. AT&T's position on this issue is set forth in greater detail in its Legal Analysis.[93]

22. AT&T admits that (i) "WCX holds a lower B Block 700MHz license covering Cellular Market Area ('CMA') 667," (ii) CMA 667 is "adjacent to the CMAs covering Austin, Houston and San Antonio, Texas, where AT&T Mobility has deployed 4G Long Term Evolution ('LTE') service," (iii) much of CMA 667 is "rural," and (iv) some portion of the population living in CMA 667 commutes, for a variety of purposes, from within WCX's licensed area to locations inside AT&T's licensed area. AT&T also does not take issue with WCX's assertion that it is a "new entrant" and "has no roaming agreements with any other provider." Because WCX has not presented any specific evidentiary support for its claim that CMA 667 is "home to several research facilities associated with major universities," AT&T does not have sufficient information to admit or deny this claim and, for this reason, the claim is denied. For similar reasons, AT&T denies WCX's assertion that a "large portion" of the population of CMA 667 commutes to other locales for the reasons specified by WCX. AT&T also denies WCX's claim that "AT&T is the only potential roaming supplier that is currently technically compatible with WCX." That assertion is incorrect under the *Data Roaming Order*.[94] There are numerous other providers operating both in the regions adjacent to CMA 667 as well as nationally from whom WCX could obtain broadband data roaming service that would be compatible with WCX's network.[95]

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[93] *See* Legal Analysis § III(A).

[94] *See* Orszag Decl. ¶¶ 7, 10, 14-18, 42, 62, 114; *see also Data Roaming Order* ¶ 46 ("[R]equesting providers that operate on different bands or technologies than the host might achieve technological compatibility by providing subscribers with multi-band and multi-mode user devices") (footnote omitted).

[95] *See* Orszag Decl. ¶¶ 7, 10, 14-18, 42, 62, 114; Prise Decl. ¶¶ 1-2, 6-16.

23. WCX has not provided any evidentiary support for its general assertion that WCX has deployed LTE services in CMA 667 using Band 17, other than a statement to that effect by its principal. Nor has WCX presented any evidence as to (i) the specific nature of the services it provides, (ii) the number of customers it serves, or (iii) any other details regarding its operations. AT&T thus lacks sufficient information to admit or deny this general assertion and, for this reason, it is denied. AT&T also lacks sufficient information to admit or deny WCX's claim that WCX's network could be used by AT&T; as such AT&T denies this claim. AT&T notes that it does not currently anticipate a need to roam on WCX's network in CMA 667.[96] AT&T denies WCX's claim that "to provide a service that is both competitive and commercially viable, it is essential that [WCX] establish a roaming arrangement with AT&T." As previously noted, there are numerous other providers with which WCX could establish roaming relationships.[97]

24. AT&T admits that in June 2011, "WCX contacted AT&T Mobility to request an LTE data roaming agreement" and that "the parties initiated negotiations." AT&T also does not dispute WCX's claim that, at that time, "WCX had not yet constructed its network and did not provide services to any customers." AT&T further admits that during the negotiations, AT&T indicated that it was working on, but had not yet completed, a draft agreement for the provision of broadband data roaming service.[98] But AT&T notes that such a draft agreement was provided to WCX on July 20, 2011, during the course of the negotiations.[99] AT&T also admits that it informed WCX that AT&T had no current intention to roam on WCX's network (which had not yet been constructed), but denies that its decision "functionally turn[ed] any potential agreement

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[96] *See* Meadors Decl. ¶ 37.

[97] *See* Legal Analysis, Background § E; Meadors Decl. ¶¶ 13-14; Orszag Decl. ¶¶ 7, 10, 14-18, 42, 62, 114; Prise Decl. ¶¶ 1-2, 6-16.

[98] *See* Meadors Decl. ¶ 16.

[99] *See* Meadors Decl. ¶ 16.

into a one-way arrangement" or that "this choice had important consequences to the commercial reasonableness of AT&T's proffered terms." In this regard, AT&T again notes that the draft agreement provided to WCX was a two-way agreement that was not materially different from AT&T's agreements with other providers on whose networks AT&T has elected to roam.[100]

25. AT&T admits that "[t]he parties' initial negotiations ultimately broke down," but notes that WCX provides a misleading and very truncated account of the parties' 2011-12 negotiations.[101] As for WCX's claim that it decided that "the better course of action was use [*sic*] its resources to eliminate several of AT&T Mobility's initial concerns: that WCX had not yet built out its network, had no customers and had not presented a proposed set of roaming terms," AT&T does not dispute WCX's statements that WCX (i) had not built out its network, (ii) had no customers, and (iii) had not presented a proposed set of roaming terms. AT&T does, however, dispute WCX's apparent contention that those concerns were the principal issues that led to the breakdown of the negotiations. As explained in the Meadors Declaration, the principal points of dispute were the same issues that currently divide the parties: usage restrictions and roaming rates.[102] AT&T does not have sufficient information to admit or deny WCX's claim regarding its reasons for electing not to pursue its formal complaint at the time. Consequently, those allegations are denied.

26. As to WCX's claim that it has "spent significant capital over the past two years and has now completed much of its [network] build-out," WCX has not cited any evidence supporting these assertions other than statements by its principal, nor has it produced any specific information regarding the build-out of its network or the amounts spent in that

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[100] *See* Meadors Decl. ¶ 16.

[101] *See* Meadors Decl. ¶¶ 15-21 (setting forth a more complete account of the 2011-12 negotiations).

[102] *See* Meadors Decl. ¶ 23.

connection. Similarly, WCX has not presented any documentation supporting its claims that (a) it has "surpassed the Commission's build-out requirements as outlined in Auction 73," (b) its "Evolved Packet Core is in place, fourteen radio sites are installed and operational, and WCX is currently providing retail service from ten of them," or (c) "WCX also has seven additional enodeB units in its staging area." Given the absence of such evidentiary support, AT&T lacks sufficient information to evaluate these statements and therefore denies them. AT&T likewise is not in a position to evaluate WCX's allegations as to its ability to "viably provide continued and additional retail services to more customers" or that "further expansion will occur on a slower schedule—or not at all—until WCX can obtain commercially reasonable roaming terms." These claims are not supported by any evidence other than statements to that effect by WCX's principal. Consequently, AT&T does not have sufficient information to admit or deny these claims and, for this reason, they are denied. AT&T further denies WCX's allegations to the extent that they are intended to suggest that WCX's inability to expand its services is due to the lack of a broadband roaming agreement with AT&T. As noted above, there are numerous other providers with which WCX could establish roaming relationships.[103] Further, the broadband data roaming proposal that AT&T has made to WCX is commercially reasonable.[104]

27. Other than a statement by its principal to that effect, WCX has not presented any evidentiary support for its claim that it has "secured tentative arrangements to provide innovative services to and in cooperation with several technology-intensive business and other advanced technology customers, but those are wholly contingent on having commercially reasonable and economically sustainable roaming terms with AT&T Mobility." Consequently, AT&T does not

[103] *See* Legal Analysis, Background § E; Meadors Decl. ¶¶ 13-14; Orszag Decl. ¶¶ 7, 10, 14-18, 42, 62, 114; Prise Decl. ¶¶ 1-2, 6-16.

[104] *See* Legal Analysis § II; Meadors Decl. ¶¶ 37-71; Orszag Decl. ¶¶ 10, 19-34, 35-66.

have sufficient information to admit or deny the allegations and, for this reason, denies those claims. AT&T does not take issue with WCX's broad assertion that "[n]ew technology uses for M2M and Internet of Things must not be prohibited." However, AT&T denies that it is seeking to prevent such uses or to prevent WCX from working with "technology-intensive business[es] and other advanced technology customers."[105] WCX is free to pursue such endeavors on its own network.[106] WCX should not, however, be permitted to use a data roaming agreement with AT&T in a manner that is not commercially reasonable and that is not consistent with the Commission's *Data Roaming Order*.[107]

28. AT&T admits that it has a commercial relationship with Amazon, and that Amazon has "developed and deployed specialized devices and applications on specialty phones and tablets." AT&T denies that it considers Amazon to be an MVNO.[108] As regards WCX's claim that it "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," AT&T does not seek to prevent WCX from pursuing such opportunities on its own network in a manner that is consistent with the *Data Roaming Order*.[109] WCX should not, however, be permitted to use a data roaming agreement to engage in back-door resale of AT&T's network, which clearly is not consistent with the Commission's *Data Roaming Order*.[110] WCX provides no evidentiary support for its statement that "AT&T's proposed terms certainly prevent

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[105] *See* Meadors Decl. ¶¶ 40-41.

[106] *See* Meadors Decl. ¶ 41.

[107] *See* Legal Analysis § I; Meadors Decl. ¶ 41; Orszag Decl. ¶¶ 10, 19-34, 63-106; *see also, e.g.*, *Data Roaming Order* ¶ 41 n.122 ("[R]oaming agreements cannot be used as a backdoor way to create *de facto* mandatory resale obligations.").

[108] *See* Meadors Decl. ¶ 41.

[109] *See* ¶ 27, *supra*.

[110] *See, e.g.*, *Data Roaming Order* ¶ 41 n.122 ("[R]oaming agreements cannot be used as a backdoor way to create *de facto* mandatory resale obligations.").

WCX from ever being able to achieve the status that would attract an Amazon." Consequently, AT&T lacks sufficient information to admit or deny this statement and, for this reason, it is denied. AT&T further denies that "AT&T's terms are anticompetitive because they erect an insurmountable barrier to entry."[111]

29. As regards WCX's claims about its dealings with the Rural Wireless Association ("RWA"), AT&T notes that WCX has not presented any evidentiary support substantiating its principal's claim that the "RWA Model Agreement" was the product of "over a year's worth of work and consultation with numerous carriers and stake holders at the RWA [involving] multiple drafts." Consequently, AT&T does not have sufficient information to admit or deny this claim and, for this reason, denies that allegation. AT&T further denies that WCX's failure to present its own commercially-reasonable agreement was a principal concern of AT&T's in 2011 or that the absence of such a proposal led to the failure of the 2011-12 negotiations.[112] Those negotiations failed because WCX took positions regarding the terms and conditions applicable to broadband data roaming that were contrary to the *Data Roaming Order*.[113] AT&T does not dispute WCX's claims that (i) it joined the RWA in 2013 and its CEO was elected Chairman of the RWA's Roaming Committee, (ii) the RWA formally adopted and approved the "RWA Model Agreement" in late June 2014, (iii) the RWA "has already updated that initial agreement and will likely continue to take in additional feedback and will continue to update its agreement based upon its recently learned best practices," or (iv) WCX "proposes that the RWA Model

[111] *See* Meadors Decl. ¶ 41; Orszag Decl. ¶¶ 7, 10, 12-18, 42, 46, 62, 89, 114.

[112] *See* Meadors Decl. ¶ 23.

[113] *See* Meadors Decl. ¶¶ 15-21.

Agreement serve as the contract embodying its requested relief." AT&T denies that the terms and conditions of the RWA Model Agreements are commercially reasonable.[114]

30. AT&T admits that WCX contacted AT&T on or about June 24, 2014, and provided a copy of the then-current RWA Model Agreement to AT&T at that time. AT&T further admits that WCX specifically requested that the RWA Model Agreement be used as the basis for a roaming agreement, and informed AT&T that WCX had now built out its network to satisfy the Commission's build-out requirements and that WCX now had retail customers. The remaining assertions in this paragraph, including allegations regarding RWA's approval of the Model Agreement, are not supported by any evidence other than statements by WCX's principal. Consequently, AT&T does not have sufficient information to admit or deny these assertions and, for this reason, they are denied.

31. AT&T does not dispute that a version of the RWA Model Agreement is attached to the Feldman Declaration as Exhibit 1. AT&T further admits that a version of the RWA Model Agreement was first delivered to AT&T on June 24, 2014, that the RWA Model Agreement was updated, and that a revised version was received by AT&T on August 15, 2014. AT&T also admits that in June 2014, WCX requested that "the parties pick back up on their prior negotiations" and that WCX inquired as to AT&T's views on the so-called "impasse issues" from the parties' earlier negotiations. The remaining assertions in this paragraph are in the nature of argument and are thus denied.

32. AT&T admits that the RWA Model Agreement includes as appendices certain materials developed by GSMA for Billing, Settlement, Physical Interconnection, and Technical Testing. AT&T further states that the reason AT&T has not taken a position regarding WCX's

[114] *See* Meadors Decl.¶¶ 72-79; Orszag Decl. ¶¶ 10, 19-34, 67-106.

proposal with regard to those specific appendices is because of WCX's refusal to negotiate with AT&T.[115] AT&T further (i) notes that WCX has not identified any provision in AT&T's proposed data roaming agreement that conflicts with the terms and conditions in the aforementioned appendices and (ii) states that those appendices are not the reason that this dispute has resulted in litigation before the Commission.[116] The remaining assertions in this paragraph are more in the nature of argument and are thus denied.

33. AT&T denies that it refused to provide answers to WCX's inquires and denies WCX's characterization of the parties' dealings in the June-July 2014 timeframe. As described in more detail in the Meadors Declaration and accompanying documents, AT&T promptly responded to WCX's inquires and repeatedly made clear its willingness to engage in good faith negotiations with WCX.[117] WCX, by contrast, never appeared to be interested in engaging in any such discussions. Instead, it requested changes in the proposed NDA that were clearly designed to facilitate WCX's ability to file a publicly-available formal complaint.[118] Further, WCX threatened to file a complaint before any such discussions between the parties could even commence.[119] AT&T denies that its July 29, 2014 term sheet "mirrored" in all material respects the terms it had provided in the negotiations two years earlier and disputes WCX's claim that "it soon became clear" that AT&T would not discuss or negotiate concerning the written terms and conditions of the RWA Model Agreement.[120] AT&T admits that (i) the NDA was executed on July 28, 2014, (ii) AT&T provided its term sheet and proposed contract on July 29, and (iii) the

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[115] *See* Meadors Decl. ¶¶ 22-36.

[116] *See* Meadors Decl. ¶¶ 22-36.

[117] *See* Meadors Decl. ¶¶ 22-36.

[118] *See* Meadors Decl. ¶¶ 23, 26.

[119] *See* Meadors Decl. ¶ 22.

[120] *See* Meadors Decl. ¶ 27.

parties exchanged a series of communications by email and phone between June 24 and August 1. AT&T further agrees that many of the same issues that divided the parties in 2012 remained disputed terms and conditions in the current negotiations between WCX and AT&T.

34. AT&T admits that WCX gave notice of intent to file a formal complaint on August 5, 2014, but AT&T denies that WCX was willing to engage in good-faith settlement discussions.[121] As AT&T pointed out in response to WCX's notice of intent to file, WCX's approach was wholly at odds with good-faith negotiation.[122] Rather, what WCX demanded was that AT&T agree to its proposed terms.[123]

35. AT&T agrees that on August 8, 2014, it provided a timely reply to WCX's Notice of Intent to file suit. AT&T denies WCX's allegation that AT&T did not make clear that AT&T was willing to engage in settlement discussions or to discuss, consider, and negotiate over WCX's proposed agreement.[124] As AT&T noted in its August 8, 2014 reply, AT&T was ready and willing to negotiate a commercially-reasonable agreement with WCX.[125] AT&T admits that it did not state that AT&T would "compromise significantly on all of the substantive issues," but makes two further points in that regard. First, WCX itself never made such a commitment. Second, and more importantly, such a commitment is not a reasonable prerequisite to settlement negotiations. Indeed, most settlement negotiations would never get started if such a commitment was a requirement to further negotiations.

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[121] *See* Meadors Decl. ¶ 31; *see also* Section I ("Introduction"), *supra*.

[122] *See* Meadors Decl. ¶ 32.

[123] *See* Meadors Decl. ¶¶ 31-32.

[124] *See* Meadors Decl. ¶ 32.

[125] *See* Meadors Decl. ¶ 32.

36. AT&T admits that WCX responded on August 11, 2014, and in that response asserted that AT&T had not specifically responded to WCX's demand for representations.[126] As to WCX's assertion that "it was willing to provide more time (until August 14) for a more detailed response" to the Notice of Intent to file a complaint, AT&T simply notes that AT&T was under no obligation to provide such a response. Finally as noted above, AT&T disputes WCX's characterization of AT&T's response to WCX's demand for unequivocal representations and notes that WCX's continued repetition of those demands coupled with its obvious unwillingness to compromise on key issues only serves to further demonstrate WCX's refusal to negotiate in good faith.[127]

37. AT&T admits that AT&T provided a "more detailed response" on August 14, 2014, but denies WCX's characterization of AT&T's willingness to engage in good faith negotiations for the reasons previously stated.[128] AT&T further denies that it "refused to negotiate from the WCX proposed terms, reiterated that only its terms were on the table, offered no concessions and failed to indicate that it was even willing to compromise in any manner."[129]

38. AT&T admits that AT&T's August 14 response characterized the WCX agreement as the original offer and AT&T's July 29 proposal as a counteroffer. AT&T further admits that, on August 15, WCX rejected that counteroffer and "proffered" a revised version of the RWA Model Agreement as a "counter" to AT&T's counter. AT&T denies that the revised version was a "new and improved RWA model" because it, too, is contrary to the *Data Roaming Order*.[130] AT&T admits that the parties agreed to conduct a telephonic meeting to determine

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[126] *See* Meadors Decl. ¶ 32.

[127] *See* ¶ 35, *supra*.

[128] *See* Meadors Decl. ¶ 32; *see also* ¶¶ 35-36, *supra*.

[129] *See* Meadors Decl. ¶ 32.

[130] *See* Legal Analysis § II; Meadors Decl. ¶ 33; Orszag Decl. ¶¶ 10, 19-34, 67-106.

whether any progress could be made toward settlement.[131] The remaining assertions in this paragraph are more in the nature of argument and are thus denied.

39. AT&T agrees that (i) the parties scheduled and then conducted a conference call on August 19, 2014; (ii) in connection with that call, AT&T suggested that the discussions initially focus on two key issues: usage restrictions and price; and (iii) WCX concurred with that suggestion. AT&T further admits that as a result of that call it quickly became apparent that the parties had very different views as to the proper resolution of the two key issues (usage restrictions and the data roaming rate). The remaining allegations in this paragraph are more in the nature of argument and are thus denied.

40. AT&T notes that it remains open to negotiation.[132] The remainder of this paragraph simply reiterates WCX's reasons for filing its complaint. AT&T denies these allegations consistent with the positions set forth in its earlier responses.

41. AT&T denies that it has violated 47 U.S.C. §§157(a), 201, 202, 254, 301, 332, and 1302 or Commission Rule 20.12. More specifically:

A. AT&T denies that it has "failed to offer a roaming arrangement that contains commercially reasonable terms and conditions" and denies that its "proffered term sheet and 'Domestic Roaming Agreement' contain numerous terms and conditions that are individually and collectively not commercially reasonable or in violation of Section 301 of the Communications Act and Rule 20.12(e).[133]

B. Sections 201, 202, 332 or Rule 20.12(a)(2) and (d) are not applicable to the matter in dispute, and AT&T further denies it has "failed to offer terms, conditions and

[131] *See* Meadors Decl. ¶ 33.

[132] Meadors Decl. ¶ 80.

[133] *See* Legal Analysis §§ II; *see also* Meadors Decl. ¶¶ 37-71; Orszag Decl. ¶¶ 10, 19-34, 35-66.

prices for 'automatic roaming' to support 'interconnected voice and data' and text-messaging that are reasonable and not unreasonably discriminatory under §§ 201, 202 and 332 as well as Rule 20.12(a)(2) and (d)."[134]

C. AT&T admits that it has not accepted WCX's proposed terms, conditions, and prices, but denies that those terms, conditions, and prices are commercially reasonable and meet the requirements of § 301 and Rule 20.12(e)."[135]

D. AT&T denies that §§ 201, 202, or 303 or Rule 20.12(a)(2) and (d) are applicable to the matter in dispute and further denies that it has "has failed to accept reasonable and not unreasonably discriminatory terms, conditions and prices that would allow 'automatic roaming' to support 'interconnected voice and data' and text-messaging that meet the requirements of §§ 201, 202 and 332 as well as Rule 20.12(a)(2) and (d)."[136]

E. AT&T denies that "its position and proposals jeopardize WCX's ability to invest in further deployment of broadband, in violation of §1302."[137]

42. AT&T acknowledges that WCX has submitted two declarations prepared by Dr. Roetter that purport to assess the extent to which WCX's proposed data roaming agreement and AT&T's proposed data roaming agreement adhere to the policies put forth by the Commission in the Commission's Roaming Rule and the *Data Roaming Order*. AT&T denies, subject to further evaluation during discovery, that Dr. Roetter is an expert with respect to the matters upon which he has opined. In addition, AT&T denies Dr. Roetter's conclusions.[138]

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[134] *See* Legal Analysis § III.

[135] *See* Legal Analysis §§ II, III(B)(1); *see also* Meadors Decl. ¶¶ 72-79; Orszag Decl. ¶¶ 10, 19-34, 67-106.

[136] *See* Legal Analysis § III.

[137] *See* Legal Analysis § II(B)(2); *see also* Orszag Decl. ¶¶ 10, 20-24, 28 83-85.

[138] *See* Orszag Decl. ¶¶ 70-75, 90-94, 98-100, 108; *see also* Legal Analysis § II.

43. AT&T acknowledges that WCX requests that the Commission base its decision on the RWA Model Agreement rather than AT&T's proposed roaming agreement but denies WCX's claims that AT&T's proposed agreement "cannot be used as even the starting point for a contested set of contract terms," that it 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," and that AT&T's proposal "cannot be adequately edited to remove all of the commercially unreasonable provisions." There is no merit to these allegations,[139] which simply reiterate the unfounded claims in WCX's Notice of Intent to file suit.[140] AT&T's proposed agreement has been used in numerous transactions with a host of different providers and, as such, the terms and conditions of these agreements are presumed by the Commission to be commercially reasonable.[141] Further, WCX has only raised issues with respect to a handful of the many provisions in AT&T's agreement.[142] Finally, the issues that WCX has raised are baseless.[143]

44. AT&T admits that WCX's proposed agreement is the RWA Model Agreement. As previously noted, WCX has not presented any documentary evidence substantiating its claims regarding the circumstances underlying the creation of the RWA Model Agreement.[144] Consequently, AT&T is without sufficient information to admit or deny that "RWA built a consensus among dozens of operators on standard terms and conditions," or that it "has committed to engage in industry best practices and to mature its terms in an open, public and

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[139] *See* Legal Analysis § II; Meadors Decl. ¶¶ 37-71; Orszag Decl. ¶¶ 35, 37, 39; *see also id.* ¶¶ 10, 19-34, 36, 38, 40-66.

[140] *See* Meadors Decl. ¶ 31.

[141] *See Data Roaming Order* ¶ 81*; see also, e.g.*, Meadors Decl. ¶ 37; Orszag Decl. ¶¶ 10, 19-34, 35-66.

[142] *See* Meadors Decl. ¶ 71.

[143] *See* Legal Analysis § II; Meadors Decl. ¶¶ 37-71; Orszag Decl. ¶¶ 63-66; *see also id* ¶¶10, 19-34, 35-64.

[144] *See* ¶ 29, *supra*.

transparent manner." For that reason, AT&T denies these claims. AT&T further denies that the RWA Model Agreement's terms are "technically sound and commercially reasonable."[145]

45. In this paragraph, WCX assigns various attributes to the RWA Model Agreement that it apparently believes support its adoption by the Commission. In so doing, however, WCX makes no effort to link those attributes to the Commission's *Data Roaming Order* or, more specifically, to the criteria for assessing commercial reasonableness set forth in that Order. In point of fact, a number of these attributes are not consistent with the Commission's *Data Roaming Order* and the Commission's commercial reasonableness standard.[146] For example, even if the RWA Model Agreement is viewed as "permissive of market entry and competition" or as permitting the "serving national carrier to make a 'reasonable profit margin' on the roaming it supplies to the home carrier," those alleged attributes do not mean that the RWA Model Agreement is consistent with the requirements that the Commission has established for broadband data roaming.[147] As explained in greater detail elsewhere in this submission, the RWA Model Agreement is not consistent with the Commission's *Data Roaming Order* in a number of key respects and, for this reason, the RWA Model Agreement must be rejected.[148] AT&T denies that the RWA Model Agreement "includes safeguards against arbitrage by the home carrier." That is simply false.[149] The RWA Model Agreement would allow extensive resale in direct contravention of the Commission's *Data Roaming Order*.[150] AT&T also denies that the RWA Model Agreement would prevent "either party from abrogating the operation of

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[145] *See* Legal Analysis § II; Meadors Decl. ¶¶ 72-79; Orszag Decl. ¶¶ 10, 19-34, 67-106.

[146] *See* Legal Analysis § II; Orszag Decl. ¶¶ 10, 19-34, 67-106.

[147] *See* Legal Analysis § I.

[148] *See* Legal Analysis § II; Meadors Decl. ¶¶ 72-79; Orszag Decl. ¶¶ 10, 19-34, 67-106.

[149] *See* Meadors Decl. ¶¶ 72-79; Orszag Decl. ¶¶ 10, 68, 70, 73, 101-06.

[150] *See* Legal Analysis §§ II(A), (B); Orszag Decl. ¶¶ 10, 25, 68, 73, 101-06.

the roaming agreement at their sole discretion in ways that lead to unjustifiable harmful and potentially irreparable consequences for the other party." That also is not true. In fact, the RWA Model Agreement would deprive the Serving Carrier of control of its own network, thereby jeopardizing the Serving Carrier's ability to provide service to its customers.[151] Finally, WCX has offered no evidence (other than Dr. Roetter's unsubstantiated statements to that effect) to support its claim that the terms of the RWA Model Agreement are "consistent with the terms and conditions in roaming agreements between other operators that have been found to be mutually satisfactory." AT&T denies that allegation.[152] Indeed, WCX has not offered any evidence that the RWA Model Agreement has ever been used in connection with an actual transaction.[153]

46. In this paragraph, WCX makes a host of broad allegations regarding what it perceives to be the difference between roaming and resale. For example, WCX asserts that roaming is not resale and argues that even '[i]f users engage in significant use when they are outside the provider's home area, then it is still roaming, and is not resale." WCX does not provide specific support for these allegations but only cites to Mr. Feldman's declaration, where he generally discusses this matter. As explained in other portions of this submission, AT&T disputes WCX's position in this regard and does not believe that WCX's position is consistent with the Commission's *Data Roaming Order*.[154] AT&T therefore denies the factual allegations and legal assertions in this paragraph.

47. AT&T admits that WCX's licensed service area is only 11,000 square miles and has a population of less than 400,000 people. AT&T, however, denies that WCX's geographic

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[151] *See* Legal Analysis § II(C); Meadors Decl. ¶¶ 72-79; Orszag Decl. ¶¶ 63-66, 108-13.

[152] *See* Legal Analysis § II(A); Meadors Decl. ¶ 72; Orszag Decl. ¶¶ 67-69, 70, 72, 75, 106-08, 112.

[153] *See* Orszag Decl. ¶¶ 67, 106.

[154] *See* Legal Analysis § I; Meadors Decl. ¶¶ 73-74; Orszag Decl. ¶¶ 10, 23, 25, 68, 70, 73, 101-06.

footprint somehow provides it with a right to transform a broadband data roaming agreement into an agreement that allows WCX to "piggy back" on AT&T facilities "to offer innovative services that work nationwide" or to "provide ubiquitous coverage for M2M and 'Internet of Things' devices and applications." That is not the purpose of data roaming and is not consistent with the Commission's *Data Roaming Order*.[155] Consequently, WCX's assertions that it "cannot by itself build out a ubiquitous network and provide ubiquitous coverage for M2M and 'Internet of Things' devices and applications" or "is too small to entice application and device developers and manufacturers to collaboratively create new, exciting services and applications" (both of which are supported by general statements from WCX's witness Roetter) are not germane to the issue of whether AT&T's proposed data roaming agreement is commercially reasonable.[156] Further, WCX's claims as to the potential benefits of its being able to "offer innovated services that work nationwide" are totally unsupported and, for this reason, are denied.

48. AT&T does not dispute WCX's assertion that a provider "that builds and operates radio networks where it has no licenses is going to be quickly hit with forfeitures and orders to desist." However, AT&T lacks sufficient information to admit or deny WCX's assertion that it "has already invested in its home area," and, for this reason, it is denied. But even if both of those two factual allegations were true, they do not justify using a data roaming agreement to effectively offer service to customers in areas where the provider does not have a license.[157] AT&T denies that a local or regional provider cannot be "incented" to invest in a network outside its home area. In fact, one of the purposes of the *Data Roaming Order* was to promote

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[155] *See* Legal Analysis § I; Meadors Decl. ¶¶ 40-41; Orszag Decl. ¶¶ 10, 19-24, 27-28, 40-41, 56-57, 74, 83-85, 103; *see also Data Roaming Order* ¶ 15 (citing regional carrier's loss of customers within its operating area as a ground for data roaming rules).

[156] *See* Legal Analysis § I.

[157] *See* Legal Analysis § I; Meadors Decl. ¶¶ 44-46; Orszag Decl. ¶¶ 10, 23, 25, 57, 68, 73, 101-06.

such facilities-based investment.[158] Further, WCX can clearly engage in such facilities-based investment; it can acquire licenses and build out those service areas.[159] In addition, if WCX wishes to offer service to customers located outside its service area, it can purchase wholesale network access for the purpose of engaging in resale.[160] What WCX cannot do is use data roaming to "piggy back" on another provider's network in violation of the *Data Roaming Order*.[161] For these reasons, AT&T denies the remaining allegations of this paragraph.

49. As regards WCX's claim that it "has already exceeded the FCC's build out requirements in its licensed home service area, and will continue to invest within that area," WCX has provided no documentary evidence to support this claim. Further Mr. Feldman states in his declaration that WCX "has already met the FCC build-out requirement," but he does not state in the cited passage that WCX "will continue to invest within that area." Because WCX does not provide supporting documentation for that allegation, AT&T does not have sufficient information to admit or deny it and, for this reason, denies the allegation. WCX's allegations about WCX's proposed agreement likewise are unsupported by any references to evidence and, for the same reason, are denied. To the extent WCX implies that AT&T's proposal is commercially unreasonable because it differs from WCX's proposal, AT&T denies that allegation.[162]

50. AT&T admits that the RWA Model Agreement's terms may "contemplate the provision of future Machine to Machine ('M2M') and 'Internet of Things' services." AT&T denies that "AT&T controls the only ubiquitous LTE network compatible with WCX

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[158] *See Data Roaming Order* ¶ 21.

[159] *See* Legal Analysis § II(B); Meadors Decl. ¶ 51; Orszag Decl. ¶¶ 10, 12-18, 20-24, 74, 83-85, 89, 114-15.

[160] *See* Legal Analysis § II(B); Orszag Decl. ¶¶ 17-18, 25, 102.

[161] *See* Legal Analysis §§ I, II(B); *Data Roaming Order* ¶ 21.

[162] *See* Legal Analysis § II; Meadors Decl. ¶¶ 72-79; Orszag Decl. ¶¶ 10, 19-34, 35-66.

technology" or that roaming on AT&T's network "is essential for WCX to enter and compete in this market to provide service to consumers and businesses that reside or conduct significant activities within WCX's licensed service area."[163] AT&T further notes that WCX's allegations certainly do not justify using a data roaming agreement as a means to compete for customers that do not reside or have only a tenuous connection to WCX's service area by piggy-backing on another provider's network.[164]

51. AT&T denies that the RWA Model Agreement "proposes a compromise-based bright dividing line between acceptable 'roaming' consumption and unacceptable roaming consumption."[165] As is clear from the Feldman declaration, the RWA Model Agreement is the product of discussions among like-minded parties. As such, it is not compromise-based in any meaningful way. Moreover, there is no evidence that the RWA Model Agreement has been implemented on a commercial basis.[166] Further, there is no "bright line." The agreement does not have any enforcement mechanism; indeed, it makes clear by its language that any "restriction" is merely aspirational.[167] Indeed, in a footnote (n.156) WCX contends that roaming at levels in excess of 90% would be acceptable. AT&T further denies that "[t]here should be no limitations to any individual account or the number of and types of devices associated with any individual account" and that "M2M and 'Internet of Things' services and applications should never be considered part of a prohibited or punished 'Permanent Roamer' pool." As explained elsewhere in this submission, WCX's positions as to the levels of permissible roaming (*i.e.*, over

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[163] *See* Legal Analysis, Background § E; § 1 (at p. 22); Prise Decl. ¶¶ 1-2, 6-16; Orszag Decl. ¶¶ 7, 10-13-18, 42, 62, 114.

[164] *See* Legal Analysis § II(B); Meadors Decl. ¶¶ 44-46; Orszag Decl. ¶¶ 10, 23, 25, 57, 68, 70, 73, 101-06.

[165] Meadors Decl. ¶¶ 72-79.

[166] Orszag Decl. ¶ 67.

[167] Meadors Decl. ¶¶ 73-74; Orszag Decl. ¶¶ 10, 68, 73, 101-02, 111.

90% of a subscriber's usage) are not consistent with the Commission's *Data Roaming Order* and are not commercially reasonable.[168] There is also no support for WCX's claim that "roaming terms and conditions should allow and encourage innovative uses that may or may not track the patterns of AT&T Mobility's users or AT&T Mobility's system-wide usage patterns." While AT&T does not deny that "[t]he services in issue are inherently mobile" and that "WCX has a limited rural geographic area," neither of these points justify the piggybacking on AT&T's network equivalent to the mandatory resale that WCX seeks.[169] Finally, the evidence to which WCX cites in support of its assertion that WCX's users "do different things and use their wireless service in different ways than urban denizens" does not support that proposition. Consequently, those claims are denied.

52. In this paragraph, WCX seeks to defend its position that there should be no effective limit on its ability to use roaming on AT&T's network. WCX asserts without offering any hard evidence that WCX "can and will continue to invest in its licensed area" and that it intends to "work with developers and promote new uses of technology in stark contrast to AT&T." Because AT&T does not have adequate information to admit or deny those claims, they are denied. WCX further argues that it is "commercially unreasonable to punish WCX if WCX's customers use their service . . . outside of WCX's licensed area in any significant measure" or to "dis-incent developers of new technologies and uses from partnering with WCX when WCX desires to enable innovation by opening up its network." AT&T denies that it seeks to "punish WCX" or to "dis-incent developers of new technologies and uses."[170] Rather, AT&T simply proposes terms and conditions for broadband data roaming that are consistent with the

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[168] *See* Legal Analysis § II(B); Meadors Decl. ¶¶ 73-74; Orszag Decl. ¶¶ 10, 25, 56-59, 60-62, 73, 101-04.

[169] *See* Meadors Decl. ¶¶ 46, 51.

[170] *See* Meadors Decl. ¶¶ 38-46; Orszag Decl. ¶¶ 114-15; *see also id.* ¶¶ 7, 10-13-18, 42, 62.

Commission's *Data Roaming Order*, commercially reasonable, and the basis for numerous data roaming agreements that are currently in effect.[171] AT&T further denies that "it is commercially reasonable for WCX and its users to have significant (but not predominant) roaming usage associated with WCX service."[172]

53. AT&T denies WCX's claim that "'[s]ignificant' roaming is not 'resale.'"[173] Further, the fact that WCX wishes to "help[] innovate in the M2M market" or "to be the host carrier of [a] new host MVNO" does not justify the use of broadband data roaming as a means of accomplishing that goal based on terms that are not commercially reasonable and that violate the *Data Roaming Order*.[174] AT&T also notes that WCX has not provided any support for the broad allegations in this paragraph, and they are therefore denied for this additional reason.

54. AT&T denies WCX's assertion that "'[s]ignificant' roaming is still 'incidental' in the legal sense, and is not 'primary' because the home network usage would still constitute the majority of WCX's traffic."[175] WCX further argues that "[i]n 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." In effect, what WCX is contending is that all usage by a customer is roaming so long as that customer has a contract with WCX. AT&T takes issue with that proposition and asserts that it is not consistent with the Commission's *Data Roaming Order*, which prohibits the transformation

[171] *See* Legal Analysis § II; Meadors Decl. ¶¶ 38-46; Orszag Decl. ¶¶ 10, 19-34, 35-66, 74, 83-85, 89, 114.

[172] *See* Legal Analysis § I, II(B); Meadors Decl. ¶¶ 38-46; Orszag Decl. ¶¶ 10, 23, 25, 68, 70, 73, 101-06.

[173] *See* Legal Analysis § II(B); Meadors Decl. ¶ 39; Orszag Decl. ¶¶ 10, 23, 25, 68, 70, 73, 101-06.

[174] *See* Legal Analysis § II(B); Meadors Decl. ¶¶ 40-41; Orszag Decl. ¶¶ 10, 12-17, 20-28, 40-41, 56-57, 83-85, 103, 106, 114-15.

[175] *See* Legal Analysis § II(B); Orszag Decl. ¶¶ 10, 23, 25, 68, 70, 73, 101-06.

of data roaming into "back-door resale," which, in turn, is not commercially reasonable.[176] AT&T further denies WCX's characterization of AT&T's positions. The usage restrictions AT&T has proposed to WCX are commercially reasonable.[177]

55. AT&T denies that "WCX's proposals independently show that its desire is for "roaming" and not "resale."[178] AT&T also disputes WCX's attempt to distinguish what it characterizes as "resale" from the type of resale that occurs when roaming is used to essentially piggy back on another provider's network. The Commission has made clear that the type of piggy-backing that WCX proposes is not roaming, but resale.[179]

56. AT&T disputes WCX's attempts to distinguish between the type of service it seeks to obtain from AT&T and that which an MNVO might purchase from a provider and then attempt to resell. The purported distinctions claimed by WCX do not justify WCX's use of a data roaming service to customers with little or no connection to WCX's service area by piggy-backing on another provider's network.[180] AT&T further denies that WCX's proposed usage does not constitute resale as that term is used in the Commission's *Data Roaming Order*.[181] AT&T also denies that such usage is consistent with the provisions of the *Data Roaming Order* or that WCX's proposal is commercially reasonable.[182]

57. WCX has not presented any documentary evidence substantiating the claim of its principal that WCX "is already offering data and other service in its home area using its own

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[176] *See Data Roaming Order* ¶ 34 ("the data roaming obligation does not create mandatory resale obligations"); *see also* Legal Analysis § I; Orszag Decl. ¶¶ 10, 19-25, 27-28, 40-41, 56-57, 68, 70, 73-74, 83-85, 101-06.

[177] *See* Legal Analysis § II(B); Meadors Decl. ¶¶ 38-46; Orszag Decl. ¶¶ 10, 19-34, 35-66.

[178] *See* Legal Analysis § II(B); Orszag Decl. ¶¶ 10, 23, 25, 68, 70, 73, 101-06.

[179] *See* Legal Analysis § II(B); Orszag Decl. ¶¶ 10, 23, 25, 68, 70, 73, 101-06.

[180] *See* Legal Analysis § II(B).

[181] *See* Legal Analysis § II(B).

[182] *See* Legal Analysis § II(B); Orszag Decl. ¶¶ 10, 23, 25, 68, 70, 73, 101-06.

spectrum and facilities." Consequently, AT&T does not have sufficient information to admit or deny this claim and, for this reason, it is denied. AT&T further denies WCX's assertion that the Commission "has expressly recognized that when a provider is self-providing in the home area, then 'roaming' cannot be equated to 'resale.'" The Commission decision cited by WCX does not support that proposition.[183] AT&T also denies WCX's claim that its "proposal, by definition, cannot be resale. It is roaming."[184] WCX's position is not consistent with the Commission's *Data Roaming Order*.[185]

58. AT&T admits that the term "incidental" does not appear in the Commission's *Data Roaming Order*, but denies WCX's assertion that the Commission's use of that term in other contexts somehow justifies WCX's position that it can use data roaming service to piggy back on another provider's network. Such usage is not consistent with the Commission's *Data Roaming Order*, and nothing that WCX cites provides otherwise.[186]

59. AT&T does not dispute the census data cited by WCX in this paragraph, nor does it dispute that some portion of the population in WCX's home area may commute from within WCX's licensed service area to locations inside AT&T's licensed service area. AT&T denies WCX's claim that "[i]f one assumes that WCX's user base is representative of the population base, AT&T's proposed terms would immediately put WCX in breach, both in terms of total percentage of devices and total percent of use." WCX has not presented any evidence to support that proposition. Consequently, AT&T does not have sufficient information to admit or deny it

[183] *See* Legal Analysis § II(B).

[184] *See* Legal Analysis § II(B).

[185] *See* Legal Analysis § II(B); *see also Data Roaming Order* ¶¶ 21, 34.

[186] *See* Legal Analysis § II(B); *see also Data Roaming Order* ¶ 21.

and, for this reason, the proposition is denied. AT&T further denies that AT&T's proposed terms are not commercially reasonable.[187]

60. AT&T denies that its proposed terms would have the various impacts described by WCX in this paragraph. To the contrary, AT&T's proposed usage provisions are terms that appear in its data roaming agreements with other providers.[188] AT&T further notes that WCX has not provided any evidence (other than the speculation of its expert witness) substantiating its claim that the usage provisions that it challenges have resulted in the types of problems described by WCX nor has that been AT&T's experience.[189] For these reasons, AT&T denies WCX's claim that AT&T's proposed restrictions are "unreasonable in the extreme."

61. AT&T denies that the parties "materially disagree" regarding the extent to which AT&T will "surveil, monitor and manage WCX user's traffic," and notes that there have been no negotiations regarding this matter.[190] AT&T further questions the relevance of, and denies as unsupported, the remaining assertions in this paragraph, which purport to describe the manner in which the traffic should be handed off and how WCX will manage its traffic. WCX's observations have nothing to do how either party may "surveil, monitor, or manage" traffic.[191] AT&T further notes that the citation to Dr. Roetter's confidential declaration is overbroad and that Dr. Roetter's assertions consist of nothing more than speculation. Finally, AT&T asserts that any terms in its proposed agreement that may relate to traffic exchange, monitoring, and management are commercially reasonable.[192]

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[187] *See* Legal Analysis § II(B); Meadors Decl. ¶¶ 37-71; Orszag Decl. ¶¶ 10, 19-34, 35-66.

[188] *See* Meadors Decl. ¶¶ 38-46; Orszag Decl. ¶¶ 10, 35, 37, 39, 58-61, 66.

[189] *See* Meadors Decl. ¶¶ 38-46.

[190] *See* Legal Analysis § II(C)(5); Meadors Decl. ¶¶ 68-69.

[191] *See* Legal Analysis § II(C)(5); Meadors Decl. ¶¶ 68-69; Orszag Decl. ¶¶ 10, 66, 73, 101.

[192] *See* Legal Analysis § II(C)(5); Meadors Decl. ¶¶ 68-69; Orszag Decl. ¶¶ 10, 36, 63-66.

62. In this paragraph, WCX describes its "specific intent" as to "service awareness" capability and purports to summarize the RWA Model Agreement's terms regarding AT&T's ability to manage traffic on its network. AT&T admits that the RWA Model Agreement contains such terms, but further notes that there have been no negotiations between the parties on these issues and it is unclear whether any areas of dispute exist regarding these matters.[193] AT&T further asserts that the terms of its agreement regarding these matters are commercially reasonable.[194]

63. AT&T denies that the ability to "inspect the content of WCX users' communications" would necessarily "constitute an invasion of privacy and a violation of user's rights to maintain full dominion over and use of their own property." AT&T further asserts that the traffic monitoring provisions of its proposed data roaming agreement are commercially reasonable and consistent with the *Data Roaming Order*.[195]

64. AT&T denies that the rate for data roaming proposed by WCX—"$0.0096 per megabyte (MB), or approximately $10 per gigabyte (GB) of data"—is currently a commercially reasonable data roaming rate for any level of usage.[196] AT&T further denies that either of those rates constitutes the "current prevailing retail rate." Retail rates generally are not offered on a per-MB basis, and the $10/GB rate fails to take into account all of the factors that affect retail rates.[197] AT&T also denies that wholesale rates "should be commensurately reduced as retail

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[193] *See* Meadors Decl. ¶¶ 68-69; Orszag Decl. ¶¶ 10, 36, 63-66.

[194] *See* Legal Analysis § II(C)(5); Meadors Decl. ¶¶ 68-69.

[195] *See* Legal Analysis § II(C)(5); Meadors Decl. ¶¶ 68-69; Orszag Decl. ¶¶ 10, 36, 63-66; *see also Data Roaming Order* ¶ 52.

[196] *See* Legal Analysis § II(A); Meadors Decl. ¶¶ 75-76; Orszag Decl. ¶¶ 26, 78-82, 88-100.

[197] *See* Orszag Decl. ¶¶ 26, 83-100.

rates go down."[198] Although negotiating parties might agree to a rate adjustment depending on the term of the agreement and other factors, the *Data Roaming Order* does not compel such a result, but instead "allows host providers to control the terms and conditions of proffered data roaming arrangements, within a general requirement of commercial reasonableness."[199]

65. AT&T admits that the parties are "very far apart on price terms." AT&T denies, however, WCX's characterization of AT&T's proposed roaming rates and reasserts that the roaming rates it has proposed are commercially reasonable.[200] AT&T denies WCX's characterization of AT&T's proposed roaming rates and further denies that a "WCX customer that roamed for 3GB of their monthly 10GB plan would yield a charge to WCX of over $1500.00." AT&T also denies that its "roaming maxima are . . . artificially low for total customer usage and individual accounts."[201] AT&T further denies that its proposed rates for data roaming "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."[202] AT&T also denies that its proposed rates "prevent carriers with relatively small or isolated licensed areas from serving large accounts and/or support innovative uses that require mobile wireless capability."[203]

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[198] *See* Meadors Decl. ¶¶ 75-76.

[199] *Data Roaming Order* ¶ 33.

[200] *See* Meadors Decl. ¶ 75. As explained in n.1, *supra*, the Second Amended Complaint will include revisions to this paragraph as agreed by the parties. The revised allegations consist of the addition of three sentences. The allegations in the first two sentences are substantially identical to the allegations in paragraph 92 of the Amended Complaint, and AT&T adopts its responses to paragraph 92 in response to those two sentences. In the third sentence, WCX adds an example purporting to show how AT&T's proposed rates would apply if WCX's hypothetical customer "roamed for 3GB of [his] monthly 10GB plan." AT&T denies this allegation in part because it appears to assume that the WCX customer would be required to roam exclusively on AT&T's network even though AT&T has shown that WCX could enter roaming arrangements with other providers. *See* Prise Decl. ¶¶ 1-2, 6-16; Orszag Decl. ¶¶ 7, 10, 18, 42-45, 62.

[201] *See* Meadors Decl. ¶¶ 38-46; Orszag Decl. ¶¶ 95-100.

[202] *See* Legal Analysis § II(A); Meadors Decl. ¶¶ 47-51; Orszag Decl. ¶¶ 10, 12-17, 39, 42-46, 52, 89, 106, 114-15.

[203] *See* Legal Analysis § II(A); Meadors Decl. ¶¶ 47-51; Orszag Decl. ¶¶ 10, 12-17, 39, 42-46, 52, 89, 106, 114-15.

66. In this paragraph, WCX purports to describe a 2007 Commission decision regarding roaming obligations and then goes on in a footnote to quote certain parts of that decision. As explained in AT&T's Legal Analysis, AT&T takes issue with WCX's interpretation of these arguments.[204]

67. AT&T denies that Dr. Roetter, in his public declaration, demonstrates that "roaming prices exceeding the prevailing retail data rate is harming and will harm rural consumers" or 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."[205] AT&T further denies that Dr. Roetter has demonstrated that "high out of home area roaming prices reduce investment incentives and opportunities with regard to home area networks" or that market conditions have changed sufficiently to justify the rates that WCX has proposed.[206] A detailed response to Dr. Roetter's declarations is set forth in the Orszag Declaration.[207] AT&T also denies WCX's claim that "high roaming charges necessarily raise the retail price small rural providers must charge for all usage, including 'regional' consumption. In other words, high roaming charges result in higher prices for all consumption." (emphasis in original).[208]

68. AT&T denies WCX's assertions that "[r]ural consumers are being harmed by high roaming prices" and that "[r]oaming 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." The citation to Dr. Roetter's declaration identified in this paragraph does not support these claims nor has WCX presented

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[204] *See* Legal Analysis § II(A).

[205] *See* Orszag Decl. ¶¶ 70-75, 90-94, 98-100, 108.

[206] *See* Orszag Decl. ¶¶ 70-75, 90-94, 98-100, 108.

[207] *See* Orszag Decl. ¶¶ 70-75, 90-94, 98-100, 108.

[208] *See* Orszag Decl. ¶¶ 95-100.

any evidence substantiating these claims. Further, the fact that the market for wireless services in rural areas is competitive undercuts this claim.[209]

69. AT&T admits that the terms of its proposed data roaming agreement are confidential and notes that it produced that proposed agreement pursuant to a Non-Disclosure Agreement, or "NDA," signed by WCX. The remaining statements in this paragraph describe how WCX has structured its response and require no separate response.

70. AT&T denies WCX's assertion that its "compromise-based offer and proposed term supplies an easy to administer rule for acceptable roaming volume, so disputes should be few." As previously noted WCX's proposed agreement is not "compromise-based" and its proposed terms do not supply "an easy to administer rule for acceptable roaming volume."[210] AT&T admits that "WCX's proposed terms and conditions allow for continued use in the event of and during the pendency of any dispute between the parties," but denies that WCX's provision is commercially reasonable.[211] Further, AT&T denies that WCX's assertion that it "must fulfill at least 50% of its users' data needs through means other than roaming on AT&T's network" is consistent with the terms of its own proposal, which makes clear that the 50% restriction is aspirational.[212] In any event, that provision is commercially unreasonable.[213]

71. AT&T admits that the RWA Model Agreement "has provisions for commercial arbitration if private negotiations fail" and allows for "FCC involvement, or if necessary judicial intervention." AT&T denies WCX's allegation that the provisions regarding Commission

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[209] *See* Legal Analysis § II(A); Orszag Decl. ¶¶ 7, 10, 13-18, 39, 42, 46, 52, 62, 89, 106, 114-15.

[210] *See* ¶ 51, *supra*.

[211] *See* Legal Analysis § II(C).

[212] RWA Model Agreement § 5 ("[E]ach Party will endeavor to provide the majority of its customers' mobile Data Services on its own Network").

[213] *See, e.g.*, Legal Analysis § II(B); Meadors Decl. ¶¶ 75-76; Orszag Decl. ¶¶ 10, 66, 68, 73, 96, 101-04.

involvement or judicial intervention are needed to "prevent irreparable harm or if a party claims the other party has violated the contract, the Act or a Commission rule."[214] The Commission has no authority to enforce contracts.[215] Further, if a party signs an agreement, one would think that that party would not seek to collaterally attack the terms of that agreement at the Commission.

72. In this paragraph, WCX explains the reasons why it purportedly seeks to preserve the Commission's continuing involvement and oversight. WCX's rationale evidences a profound lack of understanding as to the Commission's authority to become engaged in the enforcement and oversight of contracts. It has no such authority.[216] Consequently, there is no need for the Commission's continued involvement and oversight at least as it relates to the resolution of contractual disputes. For these reasons, these claims are denied.

73. AT&T denies WCX's allegation that "terms that commit post-agreement dispute resolution exclusively to some forum other than the FCC and preclude FCC oversight are unlawful and commercially unreasonable."[217] In fact, the Commission has endorsed the use of mandatory arbitration provisions.[218] The remaining assertions in this paragraph are based on WCX's faulty understanding of the role of dispute resolution provisions and the Commission precedent relating to this matter. These issues are discussed in further detail in AT&T's Legal Analysis.[219]

74. AT&T acknowledges that the RWA Model Agreement "provides that roaming will be maintained and not suspended during the pendency of any dispute resolution process,"

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[214] *See* Legal Analysis § II(C)(3); Meadors Decl. ¶ 65.

[215] *See* Legal Analysis § II(C)(3).

[216] *See* Legal Analysis § II(C)(3).

[217] *See* Legal Analysis § II(C)(3).

[218] *See* Legal Analysis § II(C)(3); *see also Data Roaming Order* ¶ 83 ("Providers are free to negotiate and mutually agree to other processes, such as third party mediation or arbitration, as a means to resolve the roaming dispute").

[219] *See* Legal Analysis § II(C)(3).

and that this differs between WCX's proposal differs from AT&T's proposal on this issue. AT&T's position on this issue is set forth in greater detail in its Legal Analysis.[220] AT&T further notes that these provisions were not the subject of full negotiation by the parties.[221]

75. AT&T denies WCX's speculative allegations about what might happen if the home carrier were to abuse its rights under the data roaming agreement and exercise those rights in a manner that might harm WCX. These allegations are unsupported and unsupportable. AT&T further denies that WCX's speculation has any basis in fact. WCX has provided no evidence and made no showing that any such abuse is likely or for that matter has previously occurred. The material cited in Dr. Roetter's declaration certainly does not support this allegation. As explained in greater detail elsewhere in this submission, AT&T's proposed provisions regarding service suspension are commercially reasonable.[222] Finally, WCX's claim that provisions in AT&T's proposed agreement limiting actual damages or prohibiting exemplary and other collateral damages would be "unconscionable" is difficult to comprehend given that WCX's own proposed agreement contains such terms.[223]

76. AT&T admits that WCX's proposed agreement has no audit terms but denies that such terms are not necessary because WCX's "proposed compromise-based '50% not roaming on AT&T' rule' is simple and clear." WCX's proposed rule is not simple or clear; indeed, WCX has misstated the aspirational limitation in the RWA Model Agreement.[224] AT&T also denies that there is a difference between auditing compliance at the 50% level as compared to at some

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[220] *See* Legal Analysis § II(C)(2).

[221] *See* Meadors Decl. ¶¶ 30-31.

[222] *See* Legal Analysis § II(C)(2); Meadors Decl. ¶¶ 56-62; Orszag Decl. ¶¶ 10, 36, 63, 101.

[223] *See* RWA Model Agreement § 18.

[224] *See* RWA Model Agreement § 5 ("[E]ach party will endeavor to provide the majority of its customers' mobile Data Services on its own Network.").

other percentage level. Likewise, the need for an auditing procedure is not driven by the nature of the restrictions to be audited but rather by the need to ensure compliance with the applicable restrictions whatever they are. As explained in other portions of this submission, the auditing provision that AT&T has proposed is both necessary and commercially reasonable.[225]

77. AT&T denies WCX's complaint as to the lack of specificity in AT&T's audit provision and the potential problems that could arise.[226] These claims are unsubstantiated and overblown. While WCX cites to Dr. Roetter's confidential declaration as support, it consists of nothing but speculation. As set forth in greater detail in its Legal Analysis, AT&T's proposed audit provision is both necessary and commercially reasonable.[227] AT&T further notes that WCX never raised these concerns with AT&T, nor has this provision been the subject of negotiation.[228]

78. As previously noted, WCX provides no documentary evidence substantiating its claim that it "has already exceeded the FCC's build-out requirements" or that it "will continue to do so."[229] Consequently, AT&T does not have sufficient information to admit or deny those allegations and, for this reason, denies the allegations. AT&T further denies WCX's claim that because WCX has purportedly met the Commission's build-out requirements within its service area, restrictions on data roaming serve no purpose. The incentives discussed in the Commission's *Data Roaming Order* are not limited to the home provider's build-out in its own existing service area; they also extend to the incentives to invest in broader, facilities-based

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[225] *See* Legal Analysis § II(C)(1); Meadors Decl. ¶¶ 53-55; Orszag Decl. ¶¶ 10, 19-24, 27-28, 40-41, 55-62, 66, 68, 73-74, 83-85, 101-04.

[226] *See* Meadors Decl. ¶¶ 53-55.

[227] *See* Legal Analysis § II(C)(1); Orszag Decl. ¶¶ 10, 19-24, 27-28, 40-41, 55-62, 66, 68, 73-74, 83-85, 101-04.

[228] *See* Meadors Decl. ¶ 55.

[229] *See* ¶ 49, *supra*.

services by both the provider requesting data roaming and the host providers that provide data roaming services.[230] Further, the fact that WCX may have built-out its local network does not justify its using data roaming service to piggy-back on another provider's networks.[231] That clearly is not consistent with the Commission's *Data Roaming Order*, nor is WCX's claim that the "main purpose of roaming is to allow customers to enjoy their service in places where the home provider does not have radio station authorizations, but its users still want to use their service."[232]

79. AT&T denies that its "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." There also is no merit to WCX's assertion that "AT&T is attempting to overrule the FCC'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." As explained in greater detail elsewhere in this submission, these allegations are baseless and meritless.[233]

80. In this paragraph WCX purports to characterize the provisions in the RWA Model Agreement that address resale and M2M services. Those provisions speak for themselves.

81. AT&T does not deny that rapid growth has been projected for certain types of M2M applications and services over mobile networks nor does it deny that the GSMA report cited by WCX contains the findings that are quoted. As regards WCX's assertion that those findings are "relevant to the circumstances and business model of WCX," AT&T notes that WCX has not presented any documentary or specific evidence substantiating that claim.

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[230] *See* Legal Analysis § I; Orszag Decl. ¶¶ 21-22, 56, 74, 86, 88; *see also Data Roaming Order* ¶ 21 (explaining that requesting providers "are unlikely to rely on roaming in place of network deployment as the primary source of their service provision").

[231] *See* Legal Analysis § I.

[232] *See* Legal Analysis § I.

[233] *See* Legal Analysis § II(C)(4).

(Indeed, no citation of evidence is provided.) Consequently, AT&T does not have sufficient information to admit or deny it and, for this reason, this claim is denied. AT&T further notes that these considerations are not consistent with the *Data Roaming Order*.[234]

82. The only support that WCX provides for its allegation that "[s]everal of the most promising and innovative opportunities for M2M applications services – automotive and health care are two examples – involve devices that may well spend a significant and unpredictable proportion of time outside the license area of a small carrier such as WCX," is a statement by its expert witness, Dr. Roetter. Neither Dr. Roetter nor WCX provide any substantiation of this claim as it relates to WCX. Consequently, AT&T lacks sufficient information to admit or deny the claim and, for this reason, it is denied. AT&T further denies that WCX should be able to use data roaming services to participate in this market segment or to offer services by piggy-backing on another provider's facilities-based network. That is not the purpose of the Commission's Data Roaming Rules.[235] AT&T also denies WCX's assertion that WCX, as a small rural provider, cannot participate in the M2M market if its roaming usage is "subject to severe restrictions." That simply is not true. Such a provider could do so either by offering such services over its own network or through a resale agreement with a facilities-based provider.[236] Consequently, WCX's claims that it is being barred from this market opportunity or that certain rural M2M applications might be overlooked are baseless and unsupported.[237] AT&T further

[234] *See* Legal Analysis § I.

[235] *See* Legal Analysis §§ I, II(B).

[236] *See* Meadors Decl. ¶¶ 40-41; Orszag Decl. ¶¶ 17-18, 25, 102.

[237] *See* Legal Analysis §§ I, II(B).

denies WCX's assertion that "AT&T's terms . . . erect barriers to entry for not only competitive wireless providers but also for the 'rural-focused' mobile app market."[238]

83. AT&T admits that the GSMA has produced Embedded SIM specifications. AT&T denies the allegations in this paragraph to the extent that they are being offered as support for WCX's claim that it should be able to use data roaming service to participate nationwide in the M2M market. Such usage is not consistent with the Commission's *Data Roaming Order*, and contract provisions designed to allow WCX to piggy back on the investment of other providers—rather than deploying its own broadband facilities—are not commercially reasonable.[239]

84. AT&T denies the allegations in this paragraph to the extent that they are being offered for the proposition that they somehow support WCX's claim that it should be able to use data roaming service to expand the service area in which it competes for subscribers and participate nationwide in the M2M market. As AT&T has already stated, such usage is not consistent with the Commission's *Data Roaming Order*, and contract provisions designed to allow WCX to piggy back on the investment of other providers—rather than deploying its own broadband facilities—are not commercially reasonable.[240]

85. AT&T does not dispute that M2M services and applications may be important to certain providers, but that fact, even if accepted as true, does not mean that WCX should be able to use data roaming services to effectively piggy-back on another provider's network by reselling AT&T's roaming services. That is not consistent with the Commission's *Data Roaming*

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[238] *See* Legal Analysis §§ I, II(B); Meadors Decl. ¶¶ 40-41; Orszag Decl. ¶¶ 10, 14-18, 25, 42, 45, 62, 89, 102, 114-15.

[239] *See* Legal Analysis §§ I, II(B); Meadors Decl. ¶¶ 40-41; Orszag Decl. ¶¶ 10, 19-25, 27-28, 40-41, 56-57, 68, 70, 73-74, 83-85, 101-06.

[240] *See* Legal Analysis §§ I, II(B); Meadors Decl. ¶¶ 40-41; Orszag Decl. ¶¶ 10, 19-25, 27-28, 40-41, 56-57, 68, 70, 73-74, 83-85, 101-06.

Order.[241] Consequently, contract provisions like the ones included in the RWA Model Agreement that are designed to facilitate such participation are not commercially reasonable.[242] As for WCX's claims regarding its business model and its intention to participate in the M2M market, AT&T again notes that WCX has not provided any documentary support for these allegations. Consequently, AT&T does not have sufficient information to admit or deny these allegations and, for this reason, they are denied.

86. WCX provides no factual support for the assertions in this paragraph and, for this reason, they are denied. AT&T further denies that the provisions of its proposed data roaming agreement, including the provisions that relate to usage, are commercially unreasonable. The commercial reasonableness of those provisions is discussed in greater detail in AT&T's Legal Analysis.[243]

87. AT&T denies the allegations of this paragraph and asserts that the provisions of its proposed data roaming agreement, including the provisions that relate to usage, are commercially reasonable. The commercial reasonableness of those provisions is discussed in greater detail in AT&T's Legal Analysis.[244]

88. AT&T denies that the parties disagree as to "whether AT&T should have the right to surveil, monitor and manage WCX user's traffic while they are roaming," and notes that these issues were never subject to negotiation and it is unclear whether there are any disputes.[245] As to the remaining allegations of this paragraph, AT&T questions their relevance. The nature of the connection between AT&T's network and WCX's network, or how WCX manages its services

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[241] *See* Legal Analysis §§ I, II(B).

[242] *See* Legal Analysis §§ I, II(B).

[243] *See* Legal Analysis § II.

[244] *See* Legal Analysis § II, II(B).

[245] *See* Meadors Decl. ¶¶ 68-69.

once the traffic reaches its network, has nothing to do with the extent to which AT&T surveils, monitors, or manages the traffic while it is on the AT&T network. AT&T further asserts that its proposal in that regard is commercially reasonable.[246]

89. In this paragraph, WCX describes its "specific intent" as to "service awareness" capability and then purports to summarize the RWA Model Agreement's terms regarding AT&T's ability to manage traffic on its network. AT&T admits that the RWA Model Agreement contains such terms but notes that there have been no negotiations between the parties regarding these matters and it is unclear whether there are any areas of dispute. AT&T further asserts that the terms of its agreement regarding these matters are commercially reasonable.[247]

90. AT&T admits that it has proposed a rate for data roaming service, but denies the remaining allegations of this paragraph, in part, because they are incomprehensible. To the extent WCX contends that AT&T has no need to know anything about the data on its network, that is simply wrong.[248] AT&T further asserts that the traffic monitoring provisions of its proposed data roaming agreement are commercially reasonable.[249]

91. AT&T denies the allegations of this paragraph and reiterates that the traffic monitoring provisions of its proposed data roaming agreement are commercially reasonable.[250]

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[246] *See* Legal Analysis § II(C)(5); Meadors Decl. ¶¶ 68-69; Orszag Decl. ¶¶ 10, 19-24, 27-28, 40-41, 55-62, 66, 68, 73-74, 83-85, 101-04.

[247] *See, e.g.*, ¶ 62, *supra*.

[248] *See* Meadors Decl. ¶¶ 68-69; Orszag Decl. ¶¶ 10, 19-24, 27-28, 40-41, 55-62, 66, 68, 73-74, 83-85, 101-04.

[249] *See* Legal Analysis § II(C)(5); Meadors Decl. ¶¶ 68-69; Orszag Decl. ¶¶ 10, 19-24, 27-28, 40-41, 55-62, 66, 68, 73-74, 83-85, 101-04; *Data Roaming Order* ¶ 52 ("providers of commercial mobile data services are free to negotiate commercially reasonable measures to safeguard quality of service against network congestion that may result from roaming traffic or to prevent harm to their networks").

[250] *See* Legal Analysis § II(C)(5); Meadors Decl. ¶¶ 68-69; Orszag Decl. ¶¶ 10, 19-24, 27-28, 40-41, 55-62, 66, 68, 73-74, 83-85, 101-04.

92. AT&T denies the allegations of this paragraph and asserts that the provisions of its proposed data roaming agreement, including the pricing provisions, are commercially reasonable. The reasonableness of these provisions is discussed in greater detail in AT&T's Legal Analysis.[251]

93. AT&T denies the allegations of this paragraph because they are so vague as to be incomprehensible.

94. For all the reasons set forth above as well as in the remainder of this Answering Submission, AT&T denies that WCX is entitled to any of the relief, including the interim relief, that it seeks.

* * *

[251] *See* Legal Analysis § II(A).

Dated: November 5, 2014

Respectfully submitted,

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TAB 2

REVISED
PUBLIC VERSION

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 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	)	

DECLARATION OF GRAM MEADORS

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I. BACKGROUND

1. My name is Gram Meadors. I am the Assistant Vice President of Alliance/Partnership, Wireless Roaming Strategy, at AT&T Mobility LLC ("AT&T"), a position I have held since March 2009. I have more than 20 years of experience in the telecommunications industry. Prior to working at AT&T, I held the following positions: Senior Vice President and General Counsel of SkyHawke Technologies, LLC (d/b/a SkyGolf), from March 2008 to March 2009; owner of Meadors Law & Business Consultants from December 2003 to March 2008; Vice President and General Counsel of SkyTel Communications, Inc., from December 2000 to December 2003; and Assistant General Counsel of SkyTel Communications, Inc., from December 1993 to December 2000.

2. I am responsible for the development of AT&T's policies with respect to domestic voice, data, and SMS roaming. In addition, I am actively involved in the negotiation of AT&T's data roaming agreements with other wireless providers and, as a consequence, I am generally familiar with the terms and conditions of each of those agreements. As noted below, AT&T currently has data roaming agreements with most domestic wireless providers that utilize technology that is compatible with AT&T's wireless network.

3. I was AT&T's principal negotiator in AT&T's initial discussions relating to a potential data roaming agreement with Worldcall Interconnect, Inc. (d/b/a Evolve Broadband) ("WCX") (together with AT&T, the "Parties"), in 2011-12, as well as in the Parties' renewed discussions concerning the same starting in June 2014. In that capacity, I was directly involved in all aspects of the discussions with Lowell Feldman (WCX's owner) and Mr. Feldman's counsel regarding a potential data roaming agreement between WCX and AT&T.

4. This declaration discusses AT&T's provision and use of data roaming services and describes the Parties' negotiations (including specific proposals) regarding a potential data roaming agreement.

II. AT&T'S PROVISION AND USE OF PRIVATE DATA ROAMING SERVICES

5. No wireless provider, no matter how large its network, has the capability to serve its customers in all locations over its own facilities. For example, AT&T, even with its extensive network, does not provide facilities-based coverage in all locations. Rather, to provide coverage in areas where they do not have facilities, wireless providers enter into roaming agreements to allow their customers to utilize other wireless providers' networks.

6. The purpose of a roaming agreement is to enable a wireless provider to provide its customers with coverage when they travel outside of the wireless provider's own service area.[1] In my experience in negotiating numerous domestic roaming agreements, AT&T and its roaming partners understand that roaming, unlike resale, is intended to be merely an incidental portion of a customer's data use. As the Commission has indicated, roaming is *not* meant to allow a wireless provider to engage in "backdoor" resale by selling wireless services to customers outside its licensed area.[2]

7. AT&T has negotiated data roaming agreements with almost all of the domestic wireless providers that market handsets compatible with AT&T's networks. AT&T currently has more than 35 commercially-negotiated data roaming agreements with other domestic wireless providers, including major providers such as T-Mobile and U.S. Cellular as well as various smaller carriers.

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[1] Second Report and Order, *In re Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Mobile Data* Services, 26 FCC Rcd. 5411¶ 9 (2011) ("*Data Roaming Order*").

[2] *See id.* ¶ 41 n.122 ("roaming arrangements cannot be used as a backdoor way to create *de facto* mandatory resale obligations") (citation omitted).

8. Most of AT&T's domestic data roaming agreements are "two-way" agreements where each party has the right, but not the obligation, to roam on the other's network.[3] Under some of these agreements, the traffic exchanged tends to be roughly balanced, resulting in relatively small net charges to one of the parties. Under other agreements, AT&T may deliver more traffic to the other wireless provider's network than it receives from that network, or it may send little or no roaming traffic to the other wireless provider's network. Cases such as the latter may arise when AT&T already has coverage throughout the other wireless provider's service area. Indeed, even where AT&T has two-way agreements, it does not roam on the other wireless provider's network in all of those cases.

9. AT&T, historically and currently, has been a net purchaser of roaming services from other domestic wireless providers. In other words, AT&T pays more in total dollars to roam on such wireless providers' networks than it receives from those wireless providers from their roaming on AT&T's network. Over the past five years, the balance of roaming payments between AT&T and other wireless providers has been as follows:

[BEGIN CONFIDENTIAL]

[redacted]

[END CONFIDENTIAL]

10. Over the past few years, the market rate for data roaming has been in decline. For example, the Declaration of Joseph Farrell, submitted with WCX's Complaint, shows that

[3] By comparison, a "one-way" agreement only covers roaming by one party to the agreement.

T-Mobile has paid steadily lower average data roaming rates over the past seven years, declining from $3.06/MB in 2008 to a projected 18¢/MB in 2014[4]—a reduction of 94% over just six years. The average data roaming rates AT&T has paid over the same time period have also declined.

11. As a result of its extensive experience negotiating and entering into data roaming agreements, AT&T has developed a draft agreement that it uses as a starting point in negotiations with other wireless providers over the provision of such services. The draft agreement reflects the kinds of terms and conditions that, in AT&T's experience, wireless providers normally will accept in arm's-length negotiations. For example, the draft agreement sets forth limits both on total data usage as well as individual customer usage and permits each Party, as the "Serving Carrier," to regulate traffic on its network in a manner consistent with the Commission's rules and precedent. Attached hereto as Exhibit 1 is a copy of AT&T's initial draft agreement (dated July 2011), and attached hereto as Exhibit 2 is a copy of AT&T's current draft agreement (dated May 1, 2014).

III. AT&T'S DEALINGS WITH MR. FELDMAN AND WCX

A. WCX BACKGROUND AND SERVICE AREA

12. WCX is a subsidiary of Worldcall, Inc., a telecommunications services and investment holding company formed in April 2004.[5] Mr. Feldman and the Worldcall companies are frequent litigants in intercarrier disputes at the Commission, in the courts, and before state public utility commissions.[6] Mr. Feldman previously was the CEO of UTEX Communications

[4] Farrell Decl. (Compl. at 130).

[5] Worldcall, "About Worldcall," available at http://www.worldcall.net/about.html (last visited Oct. 30, 2014).

[6] *See, e.g.*, *In re UTEX Commc'ns Corp.*, 47 B.R. 549, 552 (Bankr. W.D. Tex. 2011) ("AT&T and UTEX have been litigating for many years in various federal courts and before the Public Utility Commission of Texas.") (attached hereto as Exhibit 3); *In re UTEX Commc'ns Corp.*, No. 10-10599 (Bankr. W.D. Tex. Mar. 5, 2012) ("Lowell Feldman, President of UTEX, was employed by the PUC in the early 1990s. Within two weeks of hire, Feldman

Corp. (d/b/a FeatureGroup IP) ("UTEX"),[7] against which AT&T had a multi-million dollar judgment when UTEX filed for chapter 11 bankruptcy protection in March 2010.[8] UTEX's chapter 11 case was later converted to a chapter 7 liquidation, and the company ceased operations in December 2013.[9]

13. WCX holds a 700 MHz Lower Band (B Block) license to provide wireless services in Cellular Market Area ("CMA") 667, which covers an area of central Texas that is bounded by the major population centers of Houston, San Antonio, and Austin.[10] The residents of CMA 667 enjoy a competitive wireless marketplace: (i) nationwide wireless providers such as AT&T, Verizon, and Sprint all offer wireless services to the majority of CMA 667; and (ii) a number of smaller wireless providers such as Texas Broadband, Inc., and Ranch

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was in a dispute with AT&T Texas and has been in disputes with AT&T Texas ever since.") (attached hereto as Exhibit 4).

[7] Austin Business Journal, "UTEX files for bankruptcy, arbitrator says it owes AT&T $3M" (Mar. 21, 2010), available at http://www.bizjournals.com/austin/stories/2010/03/22/story8.html?page=all.

[8] Exhibit 3 (*UTEX* 2011 Decision) at 553 (noting AT&T filed a proof of claim in the amount of $9,570,642.76).

[9] Austin Business Journal, "UTEX files for bankruptcy, arbitrator says it owes AT&T $3M" (Mar. 21, 2010), available at http://www.bizjournals.com/austin/stories/2010/03/22/story8 html?page=all.; Bloomberg Businessweek, "Company Overview of UTEX Communications Corp.," available at http://investing.businessweek.com/ research/stocks/private/snapshot.asp?privcapId=99399469 (last visited Oct. 31, 2014).

[10] FCC Spectrum Dashboard, "Common Name: Worldcall," available at http://reboot.fcc.gov/spectrumdashboard (last visited Oct. 30, 2014). WCX has also held licenses in New York, the U.S. Virgin Islands, and Puerto Rico. Worldcall, "About Worldcall," available at http://www.worldcall net/about html (last visited Oct. 30, 2014). Since late 2012, AT&T has purchased licenses and leased spectrum from WCX in New York and Puerto Rico in three transactions [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]. *See* License Purchase Agreement by and between Worldcall Inc. and AT&T Mobility Spectrum LLC (Dec. 20, 2012) (acquiring New York license and leased spectrum for [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]); License Purchase Agreement by and between Worldcall Inc. and AT&T Mobility Puerto Rico, Inc. (Aug. 16, 2013) (acquiring Puerto Rico license and leased spectrum for [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]); License Purchase Agreement by and between Worldcall Inc. and AT&T Mobility Puerto Rico, Inc. (Sept. 2, 2014) (acquiring Puerto Rico licenses and leased spectrum for [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]).

Wireless, Inc., also serve communities, farms, and ranches in CMA 667.[11] According to WCX, its wireless network covers approximately 35% of CMA 667.[12]

14. As one would expect, the population centers surrounding CMA 667 (*i.e.*, Houston, San Antonio, and Austin) are covered by the networks of an array of wireless providers. Among the largest providers, AT&T, Verizon, Sprint, and T-Mobile all offer LTE service in the three cities.[13] Current data from the federal government indicate that 100% of the population in each city is covered by high-speed wireless networks with download speeds exceeding 10 MB/second.[14]

B. AT&T'S INITIAL NEGOTIATIONS WITH WCX IN 2011-12

15. On June 1, 2011, WCX approached AT&T regarding a potential LTE data roaming agreement,[15] and the next day, I indicated that AT&T would be "happy to discuss LTE roaming options [for WCX]."[16] Later that month, WCX noted that it sought "cost[-]based rates in the ½¢/MB range, or, alternatively, a roaming commitment from AT&T if at higher rates."[17] At the time, neither company operated any LTE facilities. It was my understanding that WCX was still in the planning phase for its network and had no customers.[18]

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[11] Nat'l Telecomm. and Info. Admin., "National Broadband Map," available at http://www.broadbandmap.gov (last visited Oct. 31, 2014).

[12] Feldman Decl. (Compl. at 52-53).

[13] Nat'l Telecomm. and Info. Admin., "National Broadband Map," available at http://www.broadbandmap.gov (last visited Oct. 30, 2014).

[14] *Id.*

[15] Email from L. Feldman to M. White (Cc: P. Castro), "FW: CMA10-WQJU431_CMA667-WQJZ320_Field Strength Agreement" (June 1, 2011).

[16] Email from G. Meadors to L. Feldman (Cc: C. Dunn), "FW: CMA10-WQJU431_CMA667-WQJZ320_Field Strength Agreement" (June 2, 2011).

[17] Email from G. Meadors to L. Feldman (Cc: C. Dunn), "FW: For WorldCall - LTE Questions 6/8/11" (June 14, 2011) (characterizing AT&T's understanding of WCX's data roaming requests).

[18] Email from L. Feldman to G. Meadors (Cc: C. Dunn), "RE: Today's Call - WorldCall/ATT LTE Roaming" (June 24, 2011) (initial planning for LTE network to be completed in August 2011).

16. During late June and early July, 2011, the Parties engaged in technical discussions and later executed a nondisclosure agreement.[19] AT&T also began work on a draft data roaming agreement to offer to WCX.[20] On July 20, 2011, I provided to WCX a draft data roaming agreement. Contrary to WCX's allegation that the AT&T draft agreement was a one-way agreement,[21] AT&T proposed a standard, two-way data roaming agreement pursuant to which each Party would have the right—but not the obligation—to roam on the other Party's wireless network.[22] In a later email to Mr. Feldman, I expressed confidence that "if the [P]arties continue[d] to negotiate in good faith, [they] c[ould] reach agreement on commercially[-]reasonable [terms]."[23] WCX did not provide an alternative data roaming agreement or propose specific modifications to the AT&T draft. Instead, WCX rejected AT&T's proposal and took the categorical positions it continues to advance here.[24]

17. The discussions in the summer and early fall of 2011 did not result in a data roaming agreement. From AT&T's perspective, the major sticking point in the negotiations was the Parties' "extremely divergent views on what is 'commercially reasonable' regarding the negotiation of [roaming] rates."[25] Specifically, AT&T contended that WCX's insistence on roaming rates "explicitly tied to the purchaser's desired retail rates [was] not consistent with market practices or industry precedent" and was more akin to "rate regulation rather than a

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[19] Email from M. Goggin to M. Henry, "FW: Worldcall NDA--Privileged and confidential" (Nov. 10, 2011) (forwarding NDA signed by AT&T); email from M. Henry to M. Goggin, "RE: Worldcall NDA--Privileged and confidential" (Dec. 8, 2011) (forwarding NDA signed by WCX).

[20] Email from G. Meadors to L. Feldman, "Re: Formal Roaming Offer" (July 1, 2011).

[21] *See* Am. Compl. ¶ 24.

[22] Email from G. Meadors to L. Feldman, "RE: Formal Roaming Offer" (July 20, 2011).

[23] Email from G. Meadors to L. Feldman, "RE: Formal Roaming Offer" (Aug. 1, 2011).

[24] *See, e.g.*, Email from L. Feldman to G. Meadors, "RE: Formal Roaming Offer" (Aug. 9, 2011) (WCX's attempt to highlight the "difference in how [the Parties] view [a] commercially reasonable" agreement).

[25] Email from G. Meadors to L. Feldman, "ATT/WorldCall - Follow-Up on Issues for FCC" (Aug. 15, 2011).

commercially reasonable outcome." AT&T contrasted that approach with its own proposal, which was based on the "'market rate' for roaming services" as established in AT&T's data roaming agreements with more than 35 other wireless providers.[26]

18. 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.[27] Both Parties made submissions to the Commission setting forth their respective positions and responding to specific questions from the Commission.[28] On December 13, 2011, the Parties participated in a full-day negotiating session with the Commission,[29] and following that session engaged in further discussions regarding the dispute. However, the Parties still did not reach an agreement.

19. On May 2, 2012, WCX submitted a request to the Commission for permission to file a complaint against AT&T on the Commission's accelerated docket. WCX argued, among other things, that (i) the Parties had exhausted the opportunities for Commission-supervised settlement discussions, (ii) accelerated treatment of the complaint would advance competition by allowing WCX to enter into the marketplace, (iii) the issues presented in the complaint were

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[26] *Id*.

[27] Email from M. Henry to A. Starr (Cc: G. Meadors, M. Goggin), "Worldcall Interconnect/AT&T Request for Conference Call " (Oct. 11, 2011) (requesting conference call and noting good-faith negotiations); email from M. Henry to A. Starr (Cc: G. Meadors, M. Goggin, L. Saks, R. McEnery), "RE: Worldcall Interconnect/AT&T Request for Conference Call" (Oct. 14, 2011) (providing to the Commission the Parties' joint summary of negotiations and positions).

[28] Email from L. Saks to G. Meadors, M. Goggin, M. Henry (Cc: L. Boehley), "RE: Worldcall Interconnect/AT&T Data Roaming Dispute" (Nov. 10, 2011) (Commission letter seeking additional information regarding dispute); letter from M. Goggin to L. Saks (Cc: L. Boehley, M. Henry), "Worldcall Interconnect/AT&T Request for Mediation" (Nov. 21, 2011) (AT&T's response to Commission letter); email from M. Henry to L. Saks, L. Boehley (Cc: G. Meadors, M. Goggin, S. McCollough), "Worldcall Interconnect/AT&T Data Roaming Dispute" (Nov. 21, 2011) (WCX's response to Commission letter).

[29] Email from L. Boehley to G. Meadors, M. Goggin, M. Henry, S. McCollough (Cc: A. Starr, L. Saks), "RE: Worldcall Interconnect v. AT&T Mediation" (Dec. 5, 2011) (setting mediation date).

limited in number and scope, (iv) the complaint stated a claim for a violation of a law or rule under the Commission's jurisdiction, (v) inclusion on the accelerated docket would not be unfair to AT&T given its "overwhelming disparity" in resources, and (vi) "prompt resolution [of the dispute] would benefit the [P]arties, the public, and ultimately the industry."[30]

20. On May 16, 2012, AT&T responded to WCX's proposed complaint. AT&T contended that (i) WCX's complaint failed to state a claim for a violation of a law or rule under the Commission's jurisdiction because WCX sought a "categorical regulation of roaming terms" that was inconsistent with the *Data Roaming Order*, (ii) accelerated treatment is inappropriate for "issues of broad industry import," (iii) the dispute would not advance competition given the "robustly competitive" marketplace in which WCX operated, and (iv) the accelerated docket could not "accommodate a serious application of the Commission's 'totality of the circumstances' standard of commercial reasonableness" in this case.[31]

21. On May 24, 2012, the Commission denied WCX's request for inclusion on the accelerated docket but noted that WCX could file a complaint pursuant to the Commission's rules.[32] WCX did not file a complaint with the Commission at that time. In fact, AT&T heard nothing further from WCX about the proposed data roaming agreement for over two years.

C. AT&T'S RENEWED NEGOTIATIONS WITH WCX IN 2014

22. WCX did not again contact AT&T about a potential data roaming agreement until June 24, 2014. On that date, Mr. Feldman emailed me inquiring about a potential agreement. Among other things, he noted that the prior discussions in 2011-12 had broken down after the

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[30] Email from M. Henry to L. Boehley, L. Saks, A. Starr (Cc: M. Goggin, D. Lawson), "RE: Worldcall Interconnect v. AT&T-- Potential Accelerated Docket Matter" (May 2, 2012).

[31] Letter from D. Lawson to A. Starr, L. Saks, L. Boehley (Cc: M. Henry), "Opposition to Request for Inclusion of Complaint on FCC Accelerated Docket" (May 16, 2012).

[32] Letter from L. Saks to D. Lawson, M. Henry, "Re: Potential Accelerated Docket Matter – *Worldcall Interconnect, Inc. v. AT&T Mobility, LLC*" (May 24, 2012).

Parties could not resolve issues such as usage restrictions and roaming rates. Mr. Feldman forwarded the Rural Wireless Association's (the "RWA") model data roaming agreement (the "RWA Model Agreement"), which he noted was the product of discussions among rural wireless providers (including WCX) and proposed that it should serve as the basis of an agreement between AT&T and WCX. The RWA Model Agreement benchmarked the roaming rate to the "prevailing retail rate" ($10/GB, or 0.96¢/MB), stated that the Parties would "endeavor to provide the majority of its customers' mobile data services on its own [n]etwork," and prohibited any usage restrictions. In those respects, WCX's proposed terms and conditions were similar to the positions it took in the 2011-12 negotiations. Mr. Feldman also noted, twice in the same email, that he stood ready to call on the Commission to resolve the Parties' impasse.[33]

23. After returning from business travels, on July 2, 2014, I responded to Mr. Feldman's email.[34] I noted that it appeared that disagreements remained between the Parties on the two main issues—*i.e.*, usage restrictions and roaming rates. I explained that AT&T's proposed roaming rates were based on arm's-length, negotiated "market rates" that AT&T was then paying to its domestic roaming partners and thus were plainly "commercially reasonable." I further explained AT&T's position that "more than incidental use (and certainly not up to half of the home carrier's data needs) [wa]s not 'roaming.'" I concluded by emphasizing that AT&T "welcome[d] negotiations" and was willing to enter into an agreement on commercially-reasonable terms, and stated that AT&T would make a counteroffer once the Parties executed a nondisclosure agreement, which I provided for WCX's review and execution.[35] WCX returned a revised nondisclosure agreement the following day. One of the few revisions proposed by WCX

[33] Email from L. Feldman to G. Meadors, "Refresh on Roaming with WCX" (June 24, 2014).

[34] Email from G. Meadors to L. Feldman, "AT&T/WCX Roaming Agreement" (July 2, 2014).

[35] *Id*.

was the addition of a new provision specifying WCX's right to make factual allegations in a complaint filed with the Commission.[36]

24. On July 8, 2014, prior to receiving AT&T's counteroffer, Mr. Feldman emailed me once again. He explained that unless there was "something materially different" in AT&T's counterproposal as compared to the positions AT&T took in the 2011-12 negotiations, WCX likely would file a formal complaint with the Commission. To that end, Mr. Feldman raised issues regarding, among other things, when and how the Parties would notify the Commission and the nature of the factual allegations that WCX could make in a complaint consistent with the Parties' nondisclosure agreement.[37]

25. On July 10, 2014, I responded to Mr. Feldman that it was "premature to file a complaint with the [Commission] given that [the Parties had] just begun discussions and [WCX had] yet to see AT&T's counterproposal or draft agreement." I noted that AT&T was "prepared to engage in negotiations with [WCX] for a commercially reasonable agreement" and would forward its counteroffer once the nondisclosure agreement (as further revised by AT&T) was finalized.[38]

26. On July 17, 2014, Mr. Feldman emailed me a further revised draft of the nondisclosure agreement, purportedly clarifying what information WCX could disclose in the event it filed a complaint with the Commission. Specifically, WCX proposed that it be able to provide "publicly-available" descriptions of the disputed issues and each Party's positions on such issues (including recommended resolutions).[39] On July 21, 2014, I spoke with Mr. Feldman

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[36] Email from L. Feldman to G. Meadors, "Re: ATT/WCX Roaming Agreement" (July 3, 2014).

[37] Email from L. Feldman to G. Meadors, "Re: Any Update" (July 8, 2014).

[38] Email from G. Meadors to L. Feldman, "ATT/WCX Roaming Agreement" (July 10, 2014).

[39] Email from L. Feldman to G. Meadors, "FW: WCX Mobility-Mutual_NDA (Evolve over ATT Redline).doc" (July 17, 2014).

on the telephone about WCX's proposed revisions. Although I continued to believe that the filing of a complaint was premature, we agreed on the scope of the information to be included in a public complaint and we directed our respective counsel, Jack Zinman (for AT&T) and W. Scott McCollough (for WCX), to work out the "exact language" in the nondisclosure agreement.[40] After ultimately agreeing to consult in advance of WCX's use of potentially-confidential information in a public complaint,[41] on July 28, 2014, the Parties executed the nondisclosure agreement.[42]

27. The next day, July 29, 2014, I emailed Mr. Feldman AT&T's draft term sheet and data roaming agreement. I stated that the AT&T proposal "envision[ed] the provision of voice, GSM/UMTS and LTE services." [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] I noted my sense that "rates w[ould] still be a point of disagreement," but asked Mr. Feldman to consider that "the rates [AT&T was] quoting [were] significantly below the average rates [AT&T was then] paying to its domestic roaming partners." I explained that "AT[&]T remain[ed] a net purchaser of domestic roaming services" and believed that the rates it was paying were "certainly commercially reasonable." I also requested information about WCX's operations that AT&T would need to assess WCX's roaming request, including the number of cellular sites in commercial operation, network expansion plans, current number of subscribers,

[40] Email from L. Feldman to S. McCollough (Cc: G. Meadors), "FW: WCX Mobility-Mutual_NDA (Evolve over ATT Redline).doc" (July 21, 2014); email from G. Meadors to S. McCollough (Cc: L. Feldman, J. Zinman, K. Romich), "RE: WCX Mobility-Mutual_NDA (Evolve over ATT Redline).doc" (July 24, 2014).

[41] Email from S. McCollough to J. Zinman, L. Feldman, and G. Meadors, "Re: Fwd: RE: WCX Mobility-Mutual_NDA (Evolve over ATT Redline).doc" (July 25, 2014).

[42] Email from G. Meadors to L. Feldman (Cc: S. McCollough, J. Zinman, K. Romich), "Re: Fwd: RE: WCX Mobility-Mutual_NDA (Evolve over ATT Redline).doc" (July 28, 2014) (forwarding AT&T's executed agreement); Email from L. Feldman to G. Meadors (Cc: S. McCollough), "Executed NDA" (July 28, 2014) (forwarding WCX's executed agreement).

devices offered, and the level of WCX's anticipated usage of AT&T's network. Finally, I asked Mr. Feldman to provide feedback on the AT&T proposal and information requests.[43] Attached hereto as Exhibit 5 is a copy of the AT&T proposal (dated July 29, 2014).

28. In response, Mr. Feldman once again proposed to use the RWA Model Agreement and sought AT&T's input on the draft provided. He also addressed AT&T's information requests, explaining, among other things, that (i) WCX's network included 14 "installed and operational" cellular sites, with eight currently providing service, (ii) WCX had "fluid" network expansion plans subject to its ability to enter into a data roaming agreement, (iii) WCX had "less than 500 retail subscribers" but was in discussions with several "innovative companies" about providing service once a data roaming agreement was finalized, and (iv) WCX offered smartphones and tablets running the Android mobile operating system as well as "hotspot" devices. But Mr. Feldman would not estimate WCX's anticipated usage of AT&T's network, [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[44]

29. Mr. Feldman and I continued to correspond over the next few days, with Mr. Feldman remaining insistent on using the RWA Model Agreement and what he alleged was the "prevailing retail rate" for data roaming.[45] I made it clear that AT&T viewed the RWA Model Agreement as "more [of] a regulatory advocacy prop than a serious framework for commercial negotiations of a data roaming agreement." Among other things, I noted that the RWA Model Agreement contained "rate and offnet use provisions . . . that [AT&T] w[ould] not

[43] Email from G. Meadors to L. Feldman, "Draft Term Sheet and Roaming Agreement" (July 29, 2014).

[44] Email from L. Feldman to G. Meadors, "RE: Draft Term Sheet and Roaming Agreement" (July 29, 2014).

[45] Email from L. Feldman to G. Meadors, "RE: Draft Term Sheet and Roaming Agreement" (July 30, 2014).

be able to accommodate as they obviously contemplate[d] some sort of resale, not roaming, arrangement." I contrasted that with the AT&T proposal, which had "served as . . . the basis for dozens of actual commercial negotiations and [wa]s supported by 35 executed, bilateral 3G roaming agreements with domestic carriers."

30. I also addressed some other issues raised by WCX. For example, I noted that AT&T did not "have an issue with WCX's attempt to launch a [Machine-to-Machine] business," so long as WCX was not engaged in resale by attempting to "provide services over AT[&]T's network to customers or devices that reside outside of WCX's licensed service area." I also requested an explanation of WCX's concerns regarding AT&T's proposed terms and conditions relating to billing, settlement, and suspension/termination of service, which are all based on GSMA standards. Further, I asked a number of times for WCX to propose specific changes to the AT&T proposal to serve as the basis of the negotiations. I indicated that I would be "happy to discuss any remaining concerns [Mr. Feldman] may have," and would respond to any proposed changes.[46]

31. On August 5, 2014, Mr. Feldman served an executed 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 informed AT&T that, "[u]nless the [P]arties reach[ed] a negotiated solution," WCX intended to follow through with its threat to "file a formal complaint with the . . . Commission and seek commercially reasonable terms for roaming." WCX accused AT&T of, among other things, a "[f]ailure and refusal to negotiate a roaming agreement in good faith" and "offer a roaming arrangement that contain[ed] commercially reasonable prices." WCX contended that the AT&T proposal could not be used

[46] Email from G. Meadors to L. Feldman, "RE: Draft Term Sheet and Roaming Agreement" (Aug. 1, 2014).

"as even the starting point for discussions" because it was "far too embedded with explicit and implicit commercially unreasonable results"—particularly, AT&T's proposals for usage restrictions and roaming rates. WCX concluded with a warning that unless AT&T was willing to "discuss, consider and negotiate over WCX's proposed agreement, and to compromise significantly on all of the substantive issues listed [in the Format Complaint Notice], . . . WCX w[ould] soon file a formal complaint."[47]

32. On August 8, 2014, counsel for AT&T sent a letter to counsel for WCX responding to the Formal Complaint Notice. Counsel for AT&T noted that AT&T "remain[ed] ready and willing to negotiate a commercially reasonable agreement with WCX," despite the fact that it "appear[ed] that WCX's intent from the outset [of the negotiations] ha[d] been to litigate, rather than negotiate."[48] On August 11, 2014, counsel for WCX responded that unless AT&T complied with "each and every" term set forth in his email, WCX would file a formal complaint. Specifically, WCX demanded that AT&T cease "argu[ing] with WCX's position" or "reaffirm[ing]" its own position. Further, WCX told AT&T that it must "clear[ly] and unequivocal[ly]" represent that it would negotiate over WCX's proposed agreement and "compromise significantly on all of the substantive issues."[49] On August 14, 2014, counsel for AT&T responded that AT&T "remain[ed] committed to negotiating in good faith," and that "[w]ith good faith on both sides, most of [the Parties'] differences c[ould] be resolved." Counsel

[47] Email from L. Feldman to G. Meadors, J. Zinman (Cc: S. McCollough, L. Feldman), "Formal Complaint Notice" (Aug. 5, 2014).

[48] Email from J. Zinman to S. McCollough (Cc: G. Meadors), "Re: Fwd: RE: WCX Mobility-Mutual_NDA (Evolve over ATT Redline).doc" (Aug. 8, 2014).

[49] Email from S. McCollough to J. Zinman (Cc: G. Meadors, L. Feldman), "Reply to Response to Notice Letter" (Aug. 11, 2014).

for AT&T further indicated that AT&T "remain[ed] willing to negotiate a commercially reasonable data roaming agreement with WCX."[50]

33. On August 15, 2015, counsel for WCX proposed that the Parties hold a "telephonic conversation to candidly exchange views on whether any material compromises [were] possible and real progress c[ould] be made." Counsel for WCX also forwarded a revised draft of the RWA Model Agreement and indicated that it contained "several improvements and changes" over the prior version. The revised RWA Model Agreement specified, among other things, that (i) WCX's same proposed roaming rate (0.96¢/MB) would apply and (ii) each Party would "*endeavor to provide* the majority of its customers' mobile data services on its own [n]etwork."[51]

34. On August 18, 2014, counsel for AT&T responded to counsel for WCX that AT&T was "willing to discuss both AT&T's draft roaming agreement and the revised [RWA Model Agreement] with WCX via a conference call [later] th[at] week."[52] The Parties held that teleconference on August 19, 2014. Prior to that call, the parties agreed that the two threshold issues were usage restrictions and roaming rates, and that there was no purpose in negotiating the other terms unless the principal issues were resolved.[53] During the call, it rapidly became apparent that an agreement would not be reached on the threshold issues.

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[50] Email from J. Zinman to S. McCollough (Cc: G. Meadors, L. Feldman), "RE: Reply to Response to Notice Letter" (Aug. 14, 2014).

[51] Email from S. McCollough to J. Zinman (Cc: G. Meadors, L. Feldman), "Re: Fwd: RE: WCX Mobility-Mutual_NDA (Evolve over ATT Redline).doc" (Aug. 15, 2014) (emphasis added).

[52] Email from J. Zinman to S. McCollough (Cc: G. Meadors, L. Feldman), "RE: Reply to Response to Notice Letter" (Aug. 18, 2014).

[53] Email from J. Zinman to S. McCollough (Cc: G. Meadors, L. Feldman), "RE: Reply to Response to Notice Letter" (Aug. 19, 2014); email from S. McCollough to J. Zinman (Cc: G. Meadors, L. Feldman), "RE: Reply to Response to Notice Letter" (Aug. 19, 2014).

35. On August 20, 2014, Mr. Feldman emailed me a further revised draft of the RWA Model Agreement. But he noted that he did so "merely to keep [me] apprised," as "[n]one of the changes" were in line with "AT&T's position on the major impasse issues" and WCX was "preparing to file" a formal complaint. Indeed, this draft of the RWA Model Agreement made no changes to the proposed roaming rate (0.96¢/MB) or proposed usage restriction ("endeavor" to limit to half of the total services) contained in the prior draft.[54]

36. On August 25, 2014, counsel for AT&T wrote to counsel for WCX that AT&T "remain[ed] ready and willing to provide data roaming to WCX at commercially reasonable rates and terms."[55] Rather than negotiate, on September 8, 2014, WCX filed its Complaint with the Commission.[56]

IV. AT&T'S PROPOSED ROAMING AGREEMENT

37. As I explained above, the AT&T proposal is a two-way agreement[57] with terms and conditions similar to those agreed to in "dozens of actual commercial negotiations" with other wireless providers.[58] WCX challenges the AT&T proposal on the basis of (i) usage restrictions, (ii) roaming rates, and (iii) various other provisions. WCX also criticizes the AT&T proposal in general terms.

A. USAGE RESTRICTIONS

38. AT&T's proposed usage restrictions are set forth in Section 11 of the agreement.

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[54] Email from L. Feldman to G. Meadors, "Final Follow Up" (Aug. 20, 2014).

[55] Email from J. Zinman to S. McCollough, "RE: Final Follow Up" (Aug. 25, 2014).

[56] *See* Compl.

[57] Although the AT&T proposal is a two-way agreement, AT&T does not currently anticipate the need to roam on WCX's network.

[58] Email from G. Meadors to L. Feldman, "RE: Draft Term Sheet and Roaming Agreement" (Aug. 1, 2014).

1. [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] Consistent with the Commission's *Data Roaming Order*, the purpose of the provision 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.[60] Backdoor resale is of particular concern where, as here, the wireless provider requesting data roaming service on AT&T's network has made clear that "significant roaming . . . is essential" to its business plans and that it will merely "endeavor" to provide less than 50% of its customers' services on AT&T's network.[61]

2. Machine-to-Machine Services

40. WCX expresses concern that the usage restrictions would "effectively exclude[it]" from offering certain "Machine-to-Machine" ("M2M") services. According to WCX, "[s]everal of the most promising and innovative opportunities for M2M applications services – automotive and health care are two examples – involve devices that may well spend a significant and unpredictable proportion of time outside the license area of a small carrier such as WCX."[62] As support for that claim, WCX cites to a statement that Dr. Roetter makes in his

[59] Exhibit 5 (AT&T proposal) § 11.

[60] *See Data Roaming Order* ¶ 41 n.122 (citation omitted).

[61] Am. Compl. ¶¶ 50-51.

[62] *See id*. ¶ 82.

public declaration.[63] However, Dr. Roetter's declaration provides no substantiation for his claim.[64]

41. WCX's concerns are baseless. AT&T has no issue with WCX selling M2M services to its customers, but maintains that, consistent with the *Data Roaming Order*, WCX should do so by selling services to customers that reside in its own network coverage area or through a resale agreement with a facilities-based carrier for customers that reside in its network coverage area.[65] In that sense, WCX's claim that "AT&T's [roaming] terms . . . erect . . . barrier[s] to entry"[66] is off base. Further, WCX is incorrect in contending that it has some Commission-bestowed legal right to offer M2M services via a data roaming agreement to customers that reside outside it network coverage area. Such a right 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" pronouncement in the *Data Roaming Order*.[67] Consequently, there is nothing commercially unreasonable about AT&T attempting to limit the services provided under a data roaming agreement with WCX to data roaming, not resale.[68]

3. Limit on Total Traffic Volume

42. [BEGIN CONFIDENTIAL] [redacted]

[63] *Id*. (citing Roetter Public Decl. (Compl. at 161)).

[64] *See id*.

[65] AT&T takes the same position with respect to WCX's apparent desire to resell services to MNVOs, which the RWA Model Agreement "expressly allows." *Id*. ¶ 80. I note that, contrary to WCX's assertion, AT&T does not consider Amazon to be an MNVO. *See id*. ¶ 28 ("AT&T has a relationship with and considers Amazon to be an MNVO.").

[66] *See id*.

[67] *Data Roaming Order* ¶ 41 n.122 (citation omitted)

[68] *See id*.

[END CONFIDENTIAL][69] Provisions on usage restrictions have evolved over time as AT&T and its domestic roaming partners have gained more experience with data roaming agreements. [BEGIN CONFIDENTIAL] [END CONFIDENTIAL][70]

43. As roaming rates have declined, a few domestic roaming partners have taken advantage, unilaterally converting their data roaming agreements to launch resale operations. [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] AT&T has been willing to make reasonable adjustments in this limitation, but WCX's demands have actually increased from [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] to 50% (in 2014) and prevented any such negotiations.[71]

[69] Exhibit 5 (AT&T proposal) § 11(a).

[70] Exhibit 1 (2011 Draft Agreement) § 11.

[71] As I explain below, the proposed 50% limit is really not a limitation. Rather, the RWA Model Agreement contains only an aspirational statement that each Party will "endeavor to provide the majority of its customers' mobile data services on its own [n]etwork." RWA Model Agreement § 5.

4. Limits on Individual Accounts

44. [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] The provision is designed to ensure that WCX's customers who roam on AT&T's network do, in fact, reside in WCX's licensed area. Without such a provision, WCX would be free to use the 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*.[73]

45. As I have previously noted, it is commercially reasonable for AT&T to seek to protect its investment in its network from backdoor resale.[74] Moreover, AT&T's proposed usage restrictions are not aimed at situations where a family member is forced to spend extended periods of time outside of the wireless provider's home network. If that is WCX's principal concern, that issue likely could be worked out through negotiation. Instead, 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, which appears to be what WCX aspires to do.[75]

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[72] Exhibit 5 (AT&T proposal) § 11(b). A "[p]ermanent [r]oamer" generates "all or nearly all of [its] roaming services" on AT&T's network. *See id.* § 1.

[73] *See Data Roaming Order* ¶ 41 n.122 (citation omitted).

[74] *Id*. Moreover, even if the Commission had not specified in the *Data Roaming Order* that a data roaming agreement should not be a means of permitting backdoor resale, it would be commercially reasonable for a party to limit the scope of such an agreement to actual roaming.

[75] *See* Email from G. Meadors to L. Feldman, "RE: Draft Term Sheet and Roaming Agreement" (Aug. 1, 2014) (noting that WCX's proposal "obviously contemplate[d] some sort of resale, not roaming, arrangement").

46. In sum, AT&T's proposed usage restrictions are fully consistent with industry practice and are commercially reasonable. In the *Data Roaming Order*, the Commission sought to make data roaming services available, but not on terms that undermine the "incentives" for wireless providers to "invest and innovate by using available spectrum and constructing wireless network facilities on a widespread basis."[76] AT&T's proposed usage restrictions are fully aligned with those goals.

B. ROAMING RATES

47. AT&T's proposed roaming rates are set forth in Exhibit 8 to the AT&T proposal. As I noted above, 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. In fact, AT&T's proposed roaming rates are "significantly below the average rates AT&T is currently paying to its domestic roaming partners,"[77] and thus are plainly commercially reasonable.

48. [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL][79]

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[76] *Data Roaming Order* ¶ 9.

[77] Email from G. Meadors to L. Feldman, "Draft Term Sheet and Roaming Agreement" (July 29, 2014).

[78] Exhibit 5 (AT&T proposal), Ex. 8.

[79] [BEGIN CONFIDENTIAL] [redacted]

49. [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] 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, thereby allowing the host network provider to properly predict data usage and avoid unnecessary congestion.

50. WCX does not address these rates directly. Rather, WCX and its proffered expert, Dr. Martyn Roetter, simply point out that AT&T's proposed rates exceed the "prevailing retail rate," and argue that the Commission should mandate use of the retail rate.[81] First, WCX is essentially seeking the "specific prescriptive regulation of rates," which the *Data Roaming Order* explicitly rejected. Instead, the Commission recognized the importance of "giv[ing] host providers appropriate discretion in the structure and level of [the] rates that they offer."[82] WCX's proposal is not consistent with that objective.

51. Second, WCX's position conflicts with the Commission's *Data Roaming Order*, which makes clear that data roaming rates should be at levels that maintain incentives for

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[redacted] [END CONFIDENTIAL]

[80] *Id.*

[81] *See* Am. Compl. ¶ 65; Roetter Conf. Decl. (Compl. at 193).

[82] *See Data Roaming Order* ¶ 21 (internal citation and quotations omitted).

wireless providers to invest in their own networks.[83] As a matter of fact, the "relatively high price of roaming" is exactly the "pro-investment incentive" the Commission stated would "counterbalance the incentive to 'piggy back' on another carrier's network."[84] Dr. Roetter acknowledges this aspect of the Commission's Order, but insists it is "irrelevant" to this case because WCX is licensed in a small area and cannot build a larger network.[85] That is simply incorrect. WCX could continue to expand the geographic reach of its network, which Mr. Feldman admits covers only 35% of CMA 667.[86] Further, I note that dozens of other wireless providers have agreed to roaming rates similar to what AT&T proposed to WCX. There is no reason to provide WCX with special treatment in this case.

C. OTHER PROVISIONS

52. WCX also challenges other provisions contained in the AT&T proposal. Those provisions include ones relating to (i) audit rights (Section 11(c)), (ii) suspension of service (Section 17) and termination rights (Section 20), (iii) binding arbitration (Section 23(b)), and (iv) limits of liability (Section 24). WCX also challenges, without pointing to a specific provision, AT&T's ability to monitor data roaming on its network by WCX's customers. Finally, WCX makes a generalized statement that the AT&T proposal contains vague and ambiguous terms.

1. Audit Rights (Section 11(c))

53. [BEGIN CONFIDENTIAL] [redacted]

[83] *See id.* ¶ 9.

[84] *See id.* ¶ 21.

[85] *See* Roetter Conf. Decl. (Compl. at 193).

[86] *See* Feldman Decl. (Compl. at 52-53).

[END CONFIDENTIAL][87]

54. This audit provision is commercially reasonable. Such provisions are often found in commercial agreements, and neither WCX nor Dr. Roetter claims otherwise.[88] Further, the audit provision was included in AT&T's proposal in an attempt to avoid the expense and inconvenience of further dispute resolution. As I noted above, AT&T has had to litigate payment disputes with Mr. Feldman's other companies, one of which (UTEX) went bankrupt while owing AT&T millions of dollars.[89] This audit provision helps protect AT&T against the chance of that happening again. Because [BEGIN CONFIDENTIAL] [END CONFIDENTIAL], there simply is no merit to WCX's speculation that AT&T could "manipulat[e] [ ] the underlying information in order to find a 'violation'"[90] or Dr. Roetter's claim that AT&T could use an audit as a "gotcha" to "to terminate roaming at its discretion on the flimsiest of pretexts."[91]

55. Finally, to the extent that WCX has specific concerns about the specific audit process, that is exactly the type of issue that could, and should, be addressed in further

[87] Exhibit 5 (AT&T proposal) § 11(c).

[88] *See* Am. Compl. ¶¶ 76-77; Roetter Conf. Decl. (Compl. at 202-03).

[89] *See* Exhibit 3 (*UTEX* 2011 Decision) at 552 ("AT&T and UTEX have been litigating for many years in various federal courts and before the Public Utility Commission of Texas.").

[90] Am. Compl. ¶ 77.

[91] Roetter Conf. Decl. (Compl. at 202).

negotiations. However, WCX never raised these concerns about the audit provision during the Parties' discussions. AT&T remains willing to negotiate with WCX about the specific content of this provision, but WCX has shown no interest in holding such a discussion. In fact, WCX seems to be taking the position that no audit provision should be included at all.[92]

2. Suspension and Termination (Section 17 and 20)

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

57. [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL][95]

58. [BEGIN CONFIDENTIAL] [redacted]

[92] Am. Compl. ¶ 76.

[93] Exhibit 5 (AT&T proposal) § 17(a) (emphasis added).

[94] *Id*. § 17(c).

[95] *Id*. § 17(b).

[END CONFIDENTIAL][96]

59. These are standard contract terms and conditions providing the types of protections that wireless providers expect to find in data roaming agreements. In fact, similar provisions appear in all of AT&T's dozens of data roaming agreements with other wireless providers. The provisions are also fully consistent with the *Data Roaming Order*, which recognized a network operator's right to take necessary steps to protect its network.[97]

60. Nevertheless, WCX argues that these provisions 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"; that "AT&T would have the incentive to suspend early and often . . . even when WCX had done absolutely nothing wrong"; and that WCX "likely [would] not survive" such events.[98] Dr. Roetter makes similar claims.[99]

61. WCX offers no substantiation for these assertions, and they are completely unfounded. AT&T does not operate its business in this fashion, and WCX does not point to any instance where AT&T has been found to have engaged in such conduct. Moreover, AT&T is required to provide notice in advance of any suspension of service that affects customers generally unless continuing to provide service is impracticable.[100]

62. Finally, WCX seems to suggest that the AT&T proposal is ambiguous as to when suspension and/or termination might be warranted.[101] I disagree. Again, these terms and

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[96] *Id*. § 20 (emphasis added).

[97] *See Data Roaming Order* ¶ 52.

[98] Am. Compl. ¶ 75.

[99] *See* Roetter Conf. Decl. (Compl. at 197).

[100] *See* Exhibit 5 (AT&T proposal) § 17(a).

[101] *See* Roetter Conf. Decl. (Compl. at 197).

conditions set forth specific instances when suspension and/or termination are warranted. At the same time, the provisions are intended to be broad enough to cover circumstances that might not have been anticipated at the time of contract formation.[102] That being said, AT&T is open to discussing any specific suggestions WCX might have regarding this provision.

3. Binding Arbitration (Section 23(b))

63. [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL][103]

64. These types of provisions are commonly found in a wide variety of commercial contracts and are clearly commercially reasonable. Indeed, the Commission noted in the *Data Roaming Order* that parties were free to enter into mandatory arbitration agreements in connection with data roaming agreements.[104] For its part, AT&T has negotiated to include arbitration provisions in all of its data roaming agreements with other wireless providers. In fact, the RWA Model Agreement that WCX sent to AT&T on June 24, 2014, also provided for

[102] *See* Exhibit 5 (AT&T proposal) § 20.

[103] *Id.* § 23(b)(vii).

[104] *Data Roaming Order* ¶ 83.

mandatory arbitration under the American Arbitration Association rules.[105] WCX later revised that provision to permit, but not require, arbitration.[106]

65. WCX's sole objection to Section 23(b) seems to be that it precludes the Commission's involvement in contract disputes,[107] which is permitted under the current RWA Model Agreement.[108] Similarly, Dr. Roetter envisions an "obvious and natural potential valuable role for the [Commission] in dispute resolution."[109] But the Commission does not have any general power to enforce the terms of contracts, which the *Data Roaming Order* recognizes in stating that the interpretation of data roaming agreements "will be subject to review in court under the relevant contract law,"[110] and I am not aware of any industry agreements in which the parties have attempted to substitute the Commission for standard avenues of resolving contract disputes. WCX's and Dr. Roetter's statements thus evidence a profound lack of understanding as to the Commission's authority to engage in such activities. Further, if a party signs an agreement, one would think that that party would not seek collaterally to attack the terms of that agreement in front of the Commission.

4. Limits of Liability (Section 24)

66. WCX further contends, without referencing a specific provision, that the AT&T proposal would be "unconscionable" to the extent it "limits actual damages and prohibits

[105] Email from L. Feldman to G. Meadors, "Refresh on Roaming with WCX" (June 24, 2014) (forwarding initial draft of RWA Model Agreement providing, in Section 17, for "final and binding arbitration in accordance with rules established by the American Arbitration Association").

[106] *See* RWA Model Agreement § 17 (permitting, but not requiring, arbitration).

[107] *See* Am. Compl. ¶ 73.

[108] RWA Model Agreement § 17.

[109] Roetter Conf. Decl. (Compl. at 196).

[110] *Data Roaming Order* ¶ 81.

exemplary and other collateral damages."[111] WCX presumably is referring to Section 24 of the AT&T proposal ("Limits of Liability"), [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[112]

67. Section 24 is commercially reasonable. It is a standard provision in AT&T's dozens of commercially-negotiated data roaming agreements with other wireless providers. In fact, the RWA Model Agreement contains a similar provision limiting "proven damage or loss," excluding "consequential damage or loss," to $1 million.[113] WCX seems to suggest, without any explanation, that it is only "unconscionable" for AT&T to limit liability when it also has the discretion to suspend or terminate service to WCX's customers.[114] As I explained above, however, the suspension and termination provisions in the AT&T proposal are commercially reasonable.

5. Network Monitoring (No Provision Cited)

68. WCX complains that the AT&T proposal would permit AT&T to monitor traffic on its network, including data roaming traffic, and take steps to address network congestion. WCX does not point to a specific provision that it finds objectionable but rather argues that provisions should be added to expressly limit AT&T's ability to operate its network. WCX

[111] Am. Compl. ¶ 75.

[112] Exhibit 5 (AT&T proposal) § 24.

[113] *See* RWA Model Agreement § 18.

[114] *See* Am. Compl. ¶ 75.

further suggests, without any evidentiary support, that AT&T might abuse its control over its network and thereby violate the privacy rights of WCX's customers.[115]

69. None of these allegations has any merit. As an initial matter, WCX is once again making sweeping statements about AT&T that have no basis in fact and regarding issues which WCX never raised in the Parties' negotiations. WCX's arguments are pure speculation. WCX does not point to any evidence to support its claim 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. Rather, AT&T simply seeks to confirm its ability to operate and control its network and serve the needs of its customers. In that regard, AT&T's position is fully consistent with the *Data Roaming Order*, in which the Commission made clear that it was not limiting a network operator's ability to "negotiate 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."[116] That is exactly what AT&T is doing here. AT&T's network operational procedures are fully consistent with the Commission's rules[117] and as such are commercially reasonable. Further, WCX identifies no criticisms of AT&T's customer privacy policy, which is referenced in the AT&T proposal.[118]

6. Vague and Ambiguous Terms (No Provision Cited)

70. Finally, WCX contends that the AT&T proposal is "embedded with explicit and implicit commercially unreasonable results."[119] As support for that claim, WCX cites to Dr.

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[115] *See id*. ¶¶ 61-63.

[116] *Data Roaming Order* ¶ 23.

[117] *See id*.

[118] Exhibit 5 (AT&T proposal), Ex. 4.1 § 1.6.

[119] Am. Compl. ¶ 43.

Roetter's contention in his declaration that AT&T's proposed terms are "vague, ambiguous[,] and allow AT&T [ ] far too much unconstrained discretion."[120]

71. Reading these statements, one might conclude that WCX's issues with the AT&T proposal are quite extensive. But, in reality, WCX raises objections to only a handful of the [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] comprising the AT&T proposal. The Parties have long understood that there are really two main issues in the negotiations: usage restrictions and roaming rates. Thus, the main focus of the Parties' discussions was these two issues, up until WCX filed its Complaint. To the extent there is any perceived "vagueness" or "ambiguity" in other terms, the clarification of those terms is precisely the type of issue that should be resolved between the Parties via commercial negotiation, rather than litigation.

V. WCX'S PROPOSED ROAMING AGREEMENT

72. Based on WCX's statements, AT&T understands that the RWA Model Agreement is the result of discussions between like-minded rural wireless providers—including WCX—belonging to the RWA's Roaming Committee. Notably, it appears that Mr. Feldman chaired the Roaming Committee during the discussions. As I told Mr. Feldman in my August 1, 2014 email, AT&T views the RWA Model Agreement as a policy statement—"more [of] a regulatory advocacy prop than a serious framework for commercial negotiations of a data roaming agreement." Both in its original form and as amended, the RWA Model Agreement lacks the "fully-formed set of terms and conditions designed to facilitate actual, operational [ ] roaming arrangements."[121]

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[120] Roetter Conf. Decl. (Compl. at 190).

[121] Email from G. Meadors to L. Feldman, "RE: Draft Term Sheet and Roaming Agreement" (Aug. 1, 2014).

73. The one-sided nature of WCX's proposed terms is particularly evident with respect to the Parties' two main disputed terms (usage restrictions and roaming rates) and is also manifest in other terms. First, the RWA Model Agreement does not include any reasonable usage restrictions. In fact, the RWA Model Agreement provides no usage restrictions at all. Rather, it contains only an aspirational statement that each Party will "*endeavor to provide* the majority of its customers' mobile data services on its own [n]etwork."[122]

74. AT&T contended throughout the Parties' negotiations (and still maintains) that WCX's proposal of such a provision amounts to "resale, not roaming."[123] Indeed, the RWA Model Agreement would specifically prohibit AT&T from "limit[ing] or condition[ing] . . . roaming in any manner that prohibits or diminishes the ability of [WCX] to . . . act as a *wholesaler* of [roaming services] or provide access to [roaming services] to *[r]esellers*."[124] Such a lack of usage restrictions is a tacit admission that the RWA Model Agreement violates the *Data Roaming Order* and would enable WCX to market services to customers outside of WCX's licensed service area—the very definition of "resale."

75. Second, the RWA Model Agreement imposes a cap on data roaming rates purportedly based on the "prevailing retail rate" (allegedly $10/GB, or 0.96¢/MB),[125] which WCX contends is the only commercially-reasonable benchmark for roaming rates.[126] The RWA Model Agreement also provides that the roaming rate charged to WCX will decrease as

[122] RWA Model Agreement § 5 (emphasis added).

[123] Email from G. Meadors to L. Feldman, "RE: Draft Term Sheet and Roaming Agreement" (Aug. 1, 2014).

[124] RWA Model Agreement § 5 (emphasis added).

[125] *See id*., Ex. 2.

[126] Email from L. Feldman to G. Meadors, J. Zinman (Cc: S. McCollough, L. Feldman), "Formal Complaint Notice" (Aug. 5, 2014) (forwarding Formal Complaint Notice setting forth WCX's position on roaming rates).

prevailing retail rate in the industry decreases.[127] As an initial matter, WCX's proposed rate is not the "prevailing retail rate." Taking AT&T as an example, its 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.[128] Most wireless providers, including all five of the largest U.S. wireless providers, take this approach to data plans.[129]

76. Further, WCX's contention that the Commission should mandate the benchmarking of wholesale rates to retail rates is inconsistent with the *Data Roaming Order*, in which the Commission adopted a "general requirement of commercial reasonableness" over the "specific prescriptive regulation of rates." The Commission took that position both to (i) "give host providers appropriate discretion" over roaming rates and (ii) encourage the requesting providers, through the "relatively high price of roaming," to build their own networks rather than "piggy back" on other carriers.[130] WCX's proposed rate would frustrate both goals.

77. The RWA Model Agreement also contains markedly one-sided terms relating to the suspension of data roaming services (Section 12) and the term of the agreement and termination rights (Sections 2, 13). For example, the suspension provision in the RWA Model

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[127] *See* RWA Model Agreement, Ex. 2.

[128] AT&T, "Wireless Plans," available at http://www.att.com/shop/wireless/plans/mobileshare.html (last visited Oct. 31, 2014) (AT&T offers data plans ranging from 300 MB/month to 100 GB/month).

[129] *See, e.g.*, *id*. (describing AT&T "Mobile Share" data plans ranging from 300 MB to 100 GB); Verizon Wireless, "How The MORE Everything Plan Works," available at http://www.verizonwireless.com/wcms/consumer/shop/shop-data-plans/more-everything html#how-it-works (last visited Oct. 31, 2014) (describing Verizon "more everything" data plans ranging from 250 MB to 100 GB); Sprint, "The Best Deal in Data just got better," available at http://www.sprint.com/landings/datashare/index html?INTNAV=ATG:HE:DataShare (last visited Oct. 31, 2014) ("Data Share" plans ranging from 20 GB to unlimited data); T-Mobile, "Simple Choice Plan," available at http://www.t-mobile.com/cell-phone-plans/family html#tab-navigation (last visited Oct. 31, 2014) (offering tiered "simple choice" data plans ranging from 2.5 GB to unlimited data), U.S. Cellular, "Plans," available at http://www.uscellular.com/uscellular/plans/showPlans.jsp?plan-selector-type=shared&type=plans (last visited Oct. 31, 2014) (listing five "Shared Connect" plans ranging from 20 GB to 75GB).

[130] *Data Roaming Order* ¶ 21 (internal citation and quotations omitted).

Agreement allows only the "Home Carrier" to suspend service to all of its "Authorized Users." Additionally, AT&T's ability to suspend service to individual users *on its own network* 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. Particularly concerning, however, is the requirement that AT&T "continue to provide all services . . . while a dispute [between the Parties] is being resolved,"[131] which could take months under the RWA Model Agreement's dispute resolution provision.[132] In essence, AT&T would be powerless during that time to act to protect its network or suspend service for nonpayment even when not subject to a *bona fide* dispute.

78. AT&T also has serious concerns about the RWA Model Agreement's provision stating that the agreement would continue "in perpetuity" subject to very limited termination rights.[133] Indeed, AT&T would be unable unilaterally to terminate the agreement unless (i) WCX 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.[134] 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.

79. Finally, it is AT&T's firm position that roaming on the AT&T network should be governed by an agreement that was designed specifically for the technical requirements of the AT&T network. That is not the RWA Model Agreement. The *Data Roaming Order* expressly

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[131] *See* RWA Model Agreement § 12.

[132] *See id.* § 17 (providing for a 60-day informal dispute resolution period potentially followed by arbitration, court action, or Commission involvement).

[133] *See id*. §§ 2, 13.

[134] *Id*. § 13.

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.[135] Indeed, the Commission's "rule . . . allows host providers to control the terms and conditions of the proffered data roaming agreements, within the general requirement of commercial reasonableness."[136] The AT&T proposal was designed for that purpose and, as such, should be the document from which the Parties negotiate.

VI. CONCLUSION

80. In closing, I would simply note that AT&T has been willing to negotiate, within reason, on each of the above-described points. AT&T has negotiated and entered into more than 35 separate data roaming agreements (including eight LTE roaming agreements) with a wide array of wireless providers. AT&T's willingness to negotiate extends to the proposed usage restrictions (so long as the prohibition of resale is preserved), roaming rates (so long as within the range of commercial reasonableness in the marketplace), and the other provisions about which WCX has expressed concerns. That no agreement has been reached here is due principally to WCX's insistence on commercially-unreasonable terms that are utterly unprecedented in AT&T's experience.

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[135] *Data Roaming Order* ¶ 53.

[136] *Id*. ¶ 33.

* * *

I hereby swear under penalty of perjury that the foregoing is true and correct.

Gram Meadors

November 4, 2014

EXHIBIT 1

AT&T's Initial Draft Data Roaming Agreement

EXHIBIT REMOVED AS CONFIDENTIAL

EXHIBIT 2

AT&T's Current Draft Data Roaming Agreement

EXHIBIT 3

In re UTEX Commc'ns Corp. (Bankr. W.D. Tex. 2011)

IN RE: UTEX COMMUNICATIONS CORP., Debtor.

CASE NO. 10-10599-CAG, CHAPTER 11

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

457 B.R. 549; 2011 Bankr. LEXIS 3636

September 21, 2011, Decided
September 21, 2011, Filed, Entered

COUNSEL: [**1] For UTEX Communications Corp., dba, FeatureGroup IP, Debtor: Joseph D. Martinec, Martinec, Winn, Vickers & McElroy, P.C., Austin, TX.

JUDGES: CRAIG A. GARGOTTA, UNITED STATES BANKRUPTCY JUDGE.

OPINION BY: CRAIG A. GARGOTTA

OPINION

[*552] **MEMORANDUM OPINION**

UTEX Communications Corp., d/b/a FeatureGroup IP, the debtor in possession ("Debtor" or "UTEX"), filed a petition under Chapter 11 of the Bankruptcy Code on March 3, 2010. UTEX was incorporated in Texas in 2000. UTEX provides "wholesale telecommunications services" to carriers that wish to take advantage of UTEX's interconnection with AT&T Texas ("AT&T"). UTEX charges its customers a monthly fee to take those parties' telecommunications traffic and deliver it to AT&T to run through AT&T's network so that it can reach its ultimate destination.

UTEX is a competitive local exchange carrier ("CLEC"). The Federal Telecommunications Act of 1996 requires incumbent local exchange carriers ("ILECs"), like AT&T, to enter into interconnection agreements with CLECs like UTEX. These interconnection agreements ("ICA") establish terms and conditions on which ILECs provide their competitors with, among other things, interconnection and other telecommunication services on a wholesale basis. [**2] In August 2000, AT&T and UTEX entered into an ICA setting forth the terms, conditions, and prices under which AT&T agreed to provide UTEX with (a) the ability to purchase on a wholesale basis all of AT&T's telecommunications services for resale to end users on a retail basis, (b) "Unbundled Network Elements," (c) "Ancillary Functions", and (d) "Interconnection" services.

AT&T and UTEX have been litigating for many years in various federal courts and before the Public Utility Commission of Texas. On June 1, 2009, the Public Utility Commission of Texas entered a $3.77 million arbitration award in favor of AT&T, which UTEX has appealed ("PUC Docket No. 33323").

[*553] On July 2, 2010, AT&T filed a Proof of Claim in the amount of $9,570,642.76 (Claim No. 15) on account of pre-petition amounts owed by UTEX under the ICA based on the amount of the Arbitration Award in docket no. 33323 plus those charges incurred subsequent to the award. On September 28, 2010, UTEX filed its Objection to Claim of Southwestern Bell Telephone Company d/b/a AT&T Texas (docket no. 162). On October 25, 2010, AT&T filed its Response to UTEX

Telecommunications Corp.'s Objection to Claim of Southwestern Bell Telephone Company [**3] d/b/a AT&T Texas (docket no. 167). On August 20, 2010, AT&T filed its Motion (A) For Allowance and Immediate Payment of Administrative Claims and (B) For Entry of An Order Compelling the Debtor to Immediately Assume or Reject the Interconnection Agreement with the Debtor and (C) For Relief From the Automatic Stay so that AT&T Texas May Suspend or Terminate the Interconnection Agreement (docket no. 148). In their motion, AT&T alleges that UTEX owed AT&T $102,000 for post-petition services as of the date they filed the motion. At the time AT&T filed their Motion for Summary Judgment, AT&T alleged that figure grew to $162,020.79. UTEX filed its objection to AT&T's claim on September 28, 2010 (docket no. 163).

On January 10, 2011, both parties filed competing motions for summary judgment. In its motion for summary judgment, UTEX seeks to deny AT&T's claim for pre- and post-petition services and to compel discovery and an evidentiary hearing on the amounts due under the terms of the ICA (docket no. 187). AT&T, in its motion for summary judgment, requests that the Court allow its claims in the amounts filed and direct immediate payment of all outstanding post-petition invoices, in addition [**4] to terminating the automatic stay to allow AT&T to terminate or suspend the ICA (docket no. 188). The Court held a hearing on the competing motions for summary judgment on March 29, 2011. [1]

1 After the Court took the related matters under advisement, the parties filed a number of briefs and further replies. See docket nos. 199, 200, 201, 213, 224, 231, 241, 243, and 244. The Court has considered and reviewed these pleadings in issuing this Memorandum Opinion.

The Court has jurisdiction over this matter pursuant to *28 U.S.C. §§ 157* and *1334*. This matter is a core proceeding pursuant to *28 U.S.C. § 157(b)(2)(A), (B), (C)*, and *(G)* on which this Court can enter a final judgment. This matter is referred to the Court under the District's Standing Order of Reference. Venue is proper under *28 U.S.C. §§ 1408* and *1409*. The following represents the Court's findings of fact and conclusions of law made pursuant to *Federal Rules of Bankruptcy Procedure 7052* and *9014*.

BACKGROUND OF DEBTOR

A. The Debtor's Business

UTEX was incorporated in Texas in 2000. UTEX is a competitive local exchange carrier that provides local broadband transport communications services as well as voice origination, termination, [**5] and e-911 services to voice over internet protocol ("VOIP") and internet service providers ("ISP") (docket no. 7). Essentially, UTEX uses broadband internet connectivity to connect VOIPs and ISPs throughout the state of Texas. UTEX, in addition to several other Tentities, is a subsidiary of Worldcall, Inc., a Texas corporation ("Worldcall"). *Id.* Although UTEX registered as a CLEC with the Public Utility Commission of Texas ("PUC") in 2000, UTEX does not operate as a typical CLEC that competes with AT&T by primarily providing local telecommunication services [*554] to retail end-users in Texas. Instead, UTEX provides "wholesale telecommunications services" to carriers that wish to take advantage of UTEX's interconnection with AT&T. UTEX charges its customers a monthly fee to take those parties' telecommunications traffic and deliver it to AT&T to run through AT&T's network so that it can reach its ultimate destination.

B. The PUC Matters

The following is taken primarily from the procedural history sections of the Orders of the PUC.

1. Docket 26381

The ICA went into effect on September 27, 2000, when it was approved by the PUC (docket no. 199, p. 6; "PUC Docket No. 22949"). The primary term expired [**6] on January 22, 2001, and AT&T provided a timely Non-Renewal notice, indicating that AT&T intended to terminate the ICA (docket no. 187, p. 8). Since that time the ICA has operated under "evergreen" status pending development of a new ICA. *Id.* PUC Docket No. 26381 involves an arbitration between UTEX and AT&T regarding the formation of a new ICA (docket no. 188, pg. 13).

UTEX filed its petition to arbitrate an ICA with AT&T on July 31, 2002, and AT&T filed its response on August 26, 2002 (docket no. 199, Ex. 1, p. 2). UTEX filed its amended petition for arbitration on February 6, 2003, and AT&T filed its response on March 4, 2003. *Id.* UTEX filed its second amended petition on February 17, 2005, and AT&T filed its response on March 14, 2005. *Id.* The PUC issued an order abating this docket on June

22, 2006. *Id.* In 2009, UTEX filed a petition for preemption with the Federal Communications Commission ("FCC"). *Id.* On October 9, 2009, the FCC denied the petition for preemption, but indicated in the order that a new petition for preemption would be considered if the PUC failed to act on the dispute within nine months. *Id.* UTEX filed its motion to lift the abatement in the docket on November [**7] 17, 2009. *Id.* The Arbitrators issued an order on December 22, 2009, requiring the parties to file a joint decision-point list ("DPL") setting out the issues in dispute and proposed ICA language by January 29, 2010. *Id.* The Arbitrators convened a prehearing conference on January 15, 2010. *Id.*

Numerous disagreements arose between the parties, and they were unable to file the joint DPL and ICA language by the deadline imposed by the Arbitrators. *Id.* at 3. In Order No. 27, the Arbitrators outlined the scope of the issues in the proceeding, based on the Federal Telecommunications Act of 1996 (the "FTA"). *Id.* Order No. 24 directed the parties to use the Interconnection Agreement between Southwestern Bell Telephone Company and UTEX Communications Corp., set out in the UTEX petition as the baseline ICA for the DPL and ICA submissions. *Id.* This order also permitted the parties to update their submission to include the current state of negotiations between the parties and reflect any changes in law since the petition and response were filed. *Id.* In Order No. 30, in response to motions to strike portions of the DPL and ICA language, the Arbitrators struck a number of proposed ICA provisions because [**8] they were not based on the ICA set out in the petition and were not warranted by changes in law. *Id.*

The parties eventually filed a joint proposal regarding the scope of the DPL and ICA on March 29, 2010. *Id.* The parties filed direct testimony on March 29, 2010, and filed rebuttal testimony on April 7, 2010. *Id.* The Arbitrators convened a hearing on the merits on April 13- 15, 2010. *Id.* The parties filed initial briefs on April 27, 2010, and filed reply briefs on May 7, [*555] 2010. *Id.* The Arbitrators issued the Proposal for Award ("PFA") on September 23, 2010. *Id.* The parties filed exceptions to the PFA on October 7, 2010, and replies to exceptions on October 19, 2010. *Id.*

The Arbitration Award was issued by the PUC on January 27, 2011. *Id.* at 159. UTEX and AT&T made a joint "conforming" filing on March 24, 2011 (docket no. 241). On April 14, 2011, the Commission issued an Order Extending Time to Act and Remanding Case. *Id.*

2. Docket 33323 and the Order on Reconsideration

a. Docket 33323

Docket 33323 before the PUC concerned interconnection charges billed by AT&T through September 2007 (docket no. 187, p. 5).

On November 15, 2005, UTEX filed with the PUC a complaint, request for expedited ruling, [**9] request for interim ruling, and request for emergency action regarding disputes with AT&T (then known as Southwestern Bell Telephone, L.P. d/b/a SBC Texas) (docket no. 188, ex. B, p. 4). That proceeding was assigned Docket No. 32041. *Id.* On November 22, 2005, AT&T filed a response to UTEX's complaint, which included a motion to dismiss for insufficiency and a motion to dismiss for lack of jurisdiction, arguing that the interim and expedited relief sought by UTEX should be denied. *Id.*

On December 19, 2005, Order No. 3 partially dismissed UTEX's claims, ruled on UTEX's request for interim relief, and required UTEX to file an amended complaint. *Id.* On February 8, 2006, UTEX filed its First Amended Complaint and Request for Expedited Ruling. *Id.* On February 14, 2006, AT&T filed a response to UTEX's February 8th filing seeking dismissal of the complaint for insufficiency and requesting UTEX's request for relief be denied. *Id.* at 4-5. On September 1, 2006, Order No. 4 denied AT&T's motion for dismissal. *Id.* at 5.

On October 30, 2006, Order No. 7 in Docket No. 32041 (which corresponds to Order No. 3 in Docket No. 33323) consolidated Docket Nos. 33323 and 32401. *Id.* That same day, AT&T filed [**10] a petition under the FTA for post-interconnection dispute resolution with UTEX relating to billing disputes between UTEX and AT&T. *Id.*

On November 16, 2006, the Arbitrators ruled in Order No. 4 that the ICA does not support UTEX's attempts to invoice AT&T for performance breaches alleged under Attachment 17 of the ICA *Id.* On November 29, 2006, Order No. 6 clarified that Order No. 4: (1) did not define CPN; (2) did not address the "where available" exception of Attachment 12; (3) did not define

what constitutes a "call passed without CPN," and (4) did not address the process to be used in assessing inter-LATA toll charges on calls passed without CPN. *Id.*

On April 13, 2007, Order No. 18 denied UTEX's motions for summary decisions as well as AT&T's motion to dismiss and motion to dismiss with prejudice. *Id.*

On May 5, 2007, Order No. 21 required the parties to re-submit their DPL by May 21, 2007, and stated that the Arbitrators would create their own DPL in the absence of a suitable DPL filed by the parties *Id.* On July 7, 2007, Order No. 26 memorialized the Arbitrators' final DPL developed from the parties' various individual DPL filings up to that date *Id.* On August 3, 2007, UTEX responded [**11] to Order No. 26 that UTEX claimed it had not affirmatively proposed. *Id.*

On August 14, 2007, Order No. 31 memorialized the procedural schedule, the final DPL, and established guidelines for the prehearing conference on August 15, 2007. *Id.* at 6

[*556] On August 20, 2007, Order No. 32 granted UTEX's requested interim relief by preserving the status quo business relationship between UTEX and AT&T until an entry of final order in this matter was adopted and issued by the PUC to reconsider Order No. 32 *Id.* On November 27, 2007, AT&T filed a letter expressing its willingness to defer consideration of the appeal of Order No. 32 *Id.* On December 11, 2007, the PUC issued an order indefinitely extending the time for ruling on AT&T's appeal of Order No. 32. *Id.*

The parties filed direct testimony on October 15, 2007, and rebuttal testimony on October 29, 2007 *Id.* The Arbitrators conducted a hearing on the merits on November 7-9, 2007 *Id.* The parties filed their initial post-hearing briefs on December 21, 2007, ***and*** their reply briefs on January 22, 2008. *Id.*

The PUC issued an arbitration award on June 1, 2009. *Id.* at 142. The PUC issued an Order on Arbitration Award on October 2, 2009 (docket no. 188, ex. [**12] C, p. 5).

b. Order on Reconsideration of Order on Award (February 12, 2010)

On October 16, 2009, UTEX filed a motion for clarification directed at both the June 2009 arbitration award and the PUC's order approving that award (docket no. 188, ex. G, p. 4). On October 22, 2009, UTEX filed a motion for reconsideration of the arbitration award (docket no. 188, ex. E) and an additional motion for clarification (docket no. 188, ex. F).

On February 12, 2010, the PUC issued an Order on Reconsideration of Arbitration Award (docket no. 188, ex. G) (hereinafter "Order on Reconsideration"). In the Order on Reconsideration, the PUC affirmed the arbitration award in all respects but one relating to § 1.4.1 of Attachment 12 of the parties' ICA dealing with an Enhanced Service Provider ("ESP") exemption provision. *Id.* at 1. On March 3, 2010, UTEX filed a Motion for Reconsideration of Order on Reconsideration of Arbitration Award (docket no. 188, ex. H). On May 14, 2010, the PUC issued an Order Denying Motion for Reconsideration (docket no. 188, ex. I).

On November 12, 2010, UTEX filed an appeal of the PUC's decision in Docket 33323 to the U.S. District Court for the Western District of Texas (docket no. [**13] 187, p. 32). To the best of this Court's understanding, the appeal is presently still pending before the District Court.

UTES's Objection to Claim of Southwestern Bell Telephone Company d/b/a AT&T Texas

AT&T submitted its claim for $9,570,642.76 on July 2, 2010. AT&T alleges that its claim stems from the approximately $3.77 million awarded by the PUC in Docket 33323 for AT&T's bills through September 2007, and the remainder of the claim is for amounts due on account of service charges and interest owed under the ICA through the date of filing the proof of claim.

On August 20, 2011, UTEX filed its Objection to Claim (docket no. 162). UTEX objects to AT&T's claim on several grounds:

1. UTEX argues that AT&T's claim lacks sufficient documentation under *FED. R. BANKR. P. 3001(c)*.

2. AT&T failed to provide sufficient information in order for Debtor to determine the amount of the claim or its validity.

3. UTEX argues that while AT&T's claim is based on Docket 33323, UTEX "firmly believes the decision is

fatally infected by multiple reversible errors of law and is arbitrary and capricious on many points." *Id.*

4 UTEX argues that even if it is incorrect regarding the appeal of Docket 33323, Section 4.3 [**14] of the General Terms and Conditions [*557] of the parties' ICA will operate to extinguish AT&T's claim. UTEX argues Section 4.3 "expressly limits [its] or 2010ap to only certain fiscal obligations, and amounts putatively owed for 'Interconnection' and 'intercarrier compensation' for traffic exchange is not a listed category" *Id.*

5. UTEX argues that AT&T has changed its method of calculating the amounts owed for all usage after September 2007, which was the end date of the usage and charges that gave rise to the finding in Docket 33323. UTEX acknowledges that they "cannot discern whether the precise changes for usage after September 2007 are consistent with and fully implement the PUC majority's decision in the Order on Reconsideration of Order on Award (February 12, 2010)," which UTEX alleges overruled the original Arbitrator's legal analysis and resolution of facts.

6. UTEX asserts that the PUC's decision in the Order on Reconsideration of Order on Award (February 12, 2010) in fact requires a different method of classifying traffic and therefore the amounts that are due for all usage after September 2010.

7. UTEX argues the claim should be disallowed because UTEX is entitled to an offset from [**15] AT&T that is "far larger than the amount set out in the Claim." *Id.*

On October 25, 2010, AT&T filed its Response to Debtor's Objections (docket no. 167). In their response, AT&T argues first that UTEX has failed to rebut the *prima facie* validity of AT&T's proof of claim. Second, AT&T argues that UTEX's stated intent to appeal the PUC's ruling does not affect the *res judicata* and collateral estoppel effect given to the Arbitration Award. Third, in disputing UTEX's arguments related to Section 4.3 of the current ICA, AT&T argues that amounts due from UTEX under the current ICA cannot be involuntarily waived by a replacement agreement that does not yet exist. Fourth, AT&T asserts that they have not changed their method for calculating charges due under the ICA and that UTEX lacks any factual support to back this up. Fifth, AT&T disputes UTEX's assertion that the PUC's Order on Reconsideration required AT&T to change its calculation of access charges due under the ICA. AT&T argues that the Order on Reconsideration only recognized that some of UTEX's customers are ESPs, but still held that this did not change the method for AT&T to calculate their bills. Six, AT&T disputes UTEX's alleged [**16] claims for setoff. Seventh, AT&T alleges that UTEX is merely attempting to relitigate Docket 33323 in this Court.

AT&T'S MOTION FOR ADMINISTRATIVE CLAIMS

On August 20, 2010, AT&T filed its Motion (A) For Allowance and Immediate Payment of Administrative Claims and (B) For Entry of An Order Compelling the Debtor to Immediately Assume or Reject the Interconnection Agreement with the Debtor and (C) For Relief From the Automatic Stay so that AT&T Texas May Suspend or Terminate the Interconnection Agreement (docket no. 148). In that motion, AT&T states that since UTEX filed its bankruptcy case, the it has failed to pay all of the post-petition amounts due under the ICA for post-petition services. At the time AT&T filed the motion, AT&T alleges UTEX owed them $102,000. AT&T filed the motion to seek a court order compelling immediate payment of this claim as an administrative claim under *section 503(b) of the Bankruptcy Code* and for authority to suspend or terminate the ICA based on UTEX's non-payment. AT&T argues (1) that they are entitled to an allowed administrative expense claim pursuant to *Section 503(b)(1)(A) of the Bankruptcy Code*; (2) AT&T is entitled to immediate payment of this administrative [**17] [*558] expense; and (3) the Court should require UTEX to immediately assume or reject, or allow AT&T to terminate, the ICA due to UTEX's non-payment for post-petition services.

On September 28, 2010, UTEX filed its response to AT&T's motion (docket no. 163). In their response, UTEX repeats the same arguments against AT&T's proof of claim. In addition, UTEX argues that there is no evidence of what level or amount of post-petition services are being provided by AT&T and that AT&T has not proved they have suffered any losses. UTEX also argues that they are entitled to Meet Point Billing ("MPB") trunks.

LEGAL ANALYSIS

As discussed, both parties filed competing motions for summary judgment on AT&T's pre-petition and

post-petition claims. The Court held a hearing on the motions on March 29, 2011. At the hearing, AT&T effectively laid out the areas of dispute between UTEX and AT&T. UTEX, in its briefs and at oral argument, states that there are contested issues of fact requiring discovery and a hearing. The issues UTEX believes require a hearing are (1) whether AT&T allegedly changed its method of calculating the percentage of non-CPN calls; (2) when UTEX began meeting the required no-CPN percentage; [**18] and (3) whether UTEX believes itsbills have changed. AT&T will not give its detailed call records to UTEX; therefore, UTEX has no way to verify this information. UTEX and AT&T also raise several legal issues in their pleadings and motions: (1) the interpretation of the PUC's orders; (2) whether Docket 33323 is entitled to *res judicata*/collateral estoppel effect; (3) whether section 4.3 of the existing ICA operates to absolve and discharge UTEX from all unpaid debts; (4) whether UTEX is entitled to MPB under the existing ICA; (5) whether UTEX is entitled to the offsets it claims; (6) UTEX's argument that, if AT&T is entitled to an administrative claim for the post-petition bills, that claim does not need to be paid immediately; (7) whether UTEX must be ordered to immediately assume or reject the ICA; and (8) whether AT&T's Proof of Claim is entitled to *prima facie* validity.

SUMMARY JUDGMENT STANDARD

Bankruptcy Rule 7056 applies *Rule 56(c) of the Federal Rules of Civil Procedure* to adversary proceedings. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine [**19] issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *FED. R. CIV. P. 56(c)*; ***Celotex Corp. v. Catrett**, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. To the extent facts are undisputed, a Court may resolve a case as a matter of law. ***Celotex Corp.**, 477 U.S. at 323*; ***Blackwell v. Barton**, 34 F.3d 298, 301 (5th Cir. 1994)*. The Fifth Circuit has stated "[t]he standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon evidence before the court." ***James v. Sadler**, 909 F.2d 834, 837 (5th Cir. 1990)* (citing ***Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.**, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))*.

To the extent that the non-moving party asserts the existence of factual disputes, the evidence offered by the non-moving party to support those factual contentions must be of a quality sufficient so that a rational fact finder might, at trial, find in favor of the non-moving party. ***Matsushita Elec. Indus. Co. v. Zenith Radio Corp.**, 475 U.S. 574, 585-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (non-moving party "must do more than simply show that [*559] there is some metaphysical doubt [**20] as to material facts."); ***Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* ("adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial."). If the record "taken as a whole, could not lead a rational trier of fact to find for the non-moving party, then there is no genuine issue for trial." ***LeMaire v. Louisiana**, 480 F.3d 383, 390 (5th Cir. 2007)*.

PARTIES' CONTENTIONS

A. Legal Issues

1. The PUC's Orders

a. The Order on Reconsideration

As discussed, there have been several orders from the PUC concerning these parties. UTEX argues that AT&T relies on holdings in the Arbitrators' Award in Docket 33323 that the PUC majority reversed in the Order on Reconsideration. To simplify what appeared at first glance to be a complex issue, UTEX is arguing that the Order on Reconsideration found that much of UTEX's traffic is ESP based and therefore the ESP exemption in the ICA applies, and AT&T cannot bill UTEX for this traffic.

In support of this argument, UTEX alleges in its Motion for Summary Judgment that the Order on Reconsideration reversed the Arbitrator's Award in three respects. UTEX says that the Arbitrator in Docket 33323 initially ruled [**21] that none of UTEX's customers are ESPs and thus none of the traffic was destined for or received from ESPs. UTEX points to the Order on Reconsideration to say that the PUC overruled this finding in holding that "at least some of UTEX's customers are Enhanced Service providers and some of the traffic in question was destined for or received from ESPs." UTEX cites to the Order on Reconsideration for

this quote, but the Court was unable to locate this precise quote in the document (see docket no. 187, p. 16- 17). What the PUC held was that "[b]ased on the information provided by UTEX, the Commission disagrees with the arbitrators' determination, and finds that some of this traffic is to or from ESPs." AT&T admits that this is a correct interpretation of the Order on Reconsideration (see docket no. 188, p. 39).

The second change UTEX argues is that the PUC made changes to the way to determine if a call is local. The Arbitrator in Docket 33323, UTEX argues, looked at the entire communication, and not to the "telecommunications portion" of the service that is provided by UTEX and AT&T. As a result of this ruling, the Arbitrator interpreted the agreement to rate traffic on an "end to end" [**22] basis and used the calling and called numbers as proxies for the end-points. If the numbers were not "local" to each other, then access applied. In order to determine if a call was local, the Arbitrator just looked at the calling and called numbers. UTEX argues that the majority in the Order on Reconsideration reversed this holding by looking at the "telecommunications portion"--*e.g.*, the portion of the communication that is provided by UTEX and AT&T--and the end points of the "telecommunications portion" are used to rate the call. The Order on Reconsideration held, according to UTEX, that if the "telecommunications portion" is entirely local then the ICA calls for "no compensation" (or "bill and keep") under § 1.4.1 of the ICA, and the numbers do not matter except and to the extent the signaling information did not include "CPN." UTEX summarizes this argument by saying that "for some traffic the Arbitrator's exclusive reliance on the numbers present in signaling was rejected and a completely different test was used" (docket no. 182, p.17).

[*560] AT&T, in response, refers back to the Order on Reconsideration. AT&T argues that the ESP exemption only applies to telecommunications traffic that [**23] originates and terminates in the same local calling area. The Order on Reconsideration states that "the ESP exemption in § 1.4.1 is limited to telecommunications traffic that originates and terminates in the same local calling area." Order on Reconsideration, 4. The Order on Reconsideration in turn cites to pages 66-67 of Docket 33323. It was on those pages of Docket 33323 where the PUC resolved the issue of whether AT&T's chargers are correct in terms of the treatment of ESPs. UTEX pointed to another case, the WCC Arbitration Award, for the proposition of treating ESP access as local. *See* Docket 33323, 62-63. The PUC found that AT&T's charges complied with the WCC Arbitration because this involved contract interpretation. *Id.* at 66. The PUC found that "a call to an ISP is local if the telecommunications component of the call originates and terminates in the same local area. Conversely, a call to an ISP is long distance if it originates and terminates in different local calling areas." *Id.* The PUC goes on to say that "section 1.4.1 does not expand what constitutes a local call to include non-local ESP calls (i.e., calls where the telecommunications service component originates and [**24] terminates in different calling areas)." *Id.* at 67. The Order on Reconsideration cites to these pages of Docket 33323 in stating that it reaffirms the Arbitrator's ruling that the ESP exemption is limited to telecommunications that originates and terminates in the same local calling area. The Court therefore agrees with AT&T's reading of the Order on Reconsideration and finds that the Order on Reconsideration did not alter the treatment of ESP traffic.

UTEX makes more arguments about the Order on Reconsideration overruling or changing the way AT&T could charge UTEX for calls that involved ESPs. The Court will not reconsider those arguments as the Court concluded above that the Order on Reconsideration did not alter the treatment of ESP traffic, as UTEX has argued. Additionally, the Order on Reconsideration goes on to state that "[t]he ESP exemption does not subjugate, take precedence over, or negate the operation of the Calling Party Number (CPN) provision in § 7.5 of Attachment 12. Thus, the failure to provide the CPN results in the calls being properly characterized as intraLATA toll traffic pursuant to the ICA." The Court, therefore, agrees with AT&T's reading of the Order on Reconsideration [**25] and holds that the Order on Reconsideration did not change the manner in which AT&T rated calls involving ESPs. UTEX's arguments that AT&T's bills post-September 2007 are invalid because AT&T "rel[ies] on holdings in [33323] that the PUC majority clearly reversed [in the Order on Reconsideration]" (docket no. 187, p. 16) are rejected as a matter of law.

b. The Effect of Docket 26381 on Docket 33323

UTEX argues in several areas that Docket 26381 impacts the holding in Docket 33323 (see docket no. 199,

p. 22-24). However, as pointed out by AT&T, Docket 26381 concerns the arbitration of a replacement ICA. Docket 26381 does not involve the interpretation of the existing ICA. Therefore, the Court will not discuss or entertain UTEX's arguments that Docket 26381 undermines the ruling in Docket 33323.

2. The Legal Effect of Docket 33323

UTEX argues that the $3,777,388.56 the PUC found UTEX owes AT&T is not a present obligation. UTEX argues that AT&T does not have an enforceable judgment based on Docket 33323 as the order is not a judgment for money. UTEX [*561] states that, unlike a court, the PUC lacks the express or implied authority to award damages. UTEX cites to ***Penny v. Southwestern Bell Tel. Co.***, *906 F.2d 183, 186 (5th Cir. 1990)* [**26] for the proposition that the judicial power to award damages cannot be found in the Public Utility Regulatory Act, either through express terms or by implication. UTEX cites a litany of cases which hold that after a state commission interprets an ICA, if money is involved, the prevailing party must then turn to a court with judicial power and reduce the award to an actual judgment, much like what must occur with regard to a decision by a commercial arbitrator (see docket no. 199, p. 8-12 (citations omitted)). UTEX states that AT&T itself admitted during the PUC proceeding that it would have to go to court to reduce the finding to a judgment and states that AT&T has not yet done so.

Before going into AT&T's response to UTEX's arguments here, it is worth pointing to a quote later in the Fifth Circuit case cited by UTEX. That Court, while stating that the PUC does not have exclusive jurisdiction over a rate discrimination case, does have a role to play in the adjudication of that claim. ***Penny***, *906 F.2d at 186-87*. The Fifth Circuit went on:

> The PUC has some obvious expertise in the area of determining whether rates have been applied discriminatorily. Of perhaps even greater importance is [**27] the fact that the PUC can provide more uniformity in the adjudication of that issue than can the number of different courts in which the claims may be brought. Under the doctrine of primary jurisdiction, a trial court can reach out and touch that expertise and uniformity and then use the PUC's determination as a basis for determining whether and what types of damages are appropriate in a particular case.

Id. at 187.

AT&T follows this line of thinking and argues that "while a party to a proceeding before the Texas PUC may need to go to a District Court for collection purposes (only if the other party refuses to comply), the Texas PUC's rulings are still entitled to *res judicata* and collateral estoppel effects" (docket no. 200, p. 17). The Fifth Circuit has held that Texas law determines the preclusive effect of a Texas administrative decision on subsequent federal litigation. ***Rhoades v. Casey***, *196 F.3d 592, 601-02 (5th Cir. 1999)*. Under Texas law, determinations made by a Texas administrative agency acting in a judicial capacity are afforded collateral estoppel and *res judicata* effect. ***Igal v. Brightstar Info. Tech. Group, Inc.*** *250 S.W.3d 78, 86-90 (Tex. 2008)* (internal citations omitted). [**28] Texas courts have held that "[t]he doctrine of collateral estoppel or issue preclusion can be based on an administrative decision if the administrative agency acted in a judicial capacity and resolved disputed issues of fact properly before it which the parties had an adequate opportunity to litigate." ***Cianci v. M. Till, Inc.***, *34 S.W.3d 327, 330 (Tex.App.--Eastland 2000)* (quoting ***United States v. Utah Constr. & Mining Co.***, *384 U.S. 394, 422, 86 S. Ct. 1545, 16 L. Ed. 2d 642, 176 Ct. Cl. 1391 (1966))* (additional citations omitted). Additionally, the Fifth Circuit has held that "[t]he doctrine of *res judicata* applies to relitigation of claims previously determined by an administrative agency." ***Rhoades***, *197 F.3d at 602*. So, as can be seen, an order from an administrative agency can be given both *res judicata* and collateral estoppel effect. Therefore the Court holds that UTEX's argument that the amount awarded in Docket 33323 is not a "present obligation" is a red herring to the greater issue of [*562] whether AT&T is entitled to their pre and post-petition claims.

However, merely determining that an order from an administrative agency can be given *res judicata* and collateral estoppel effect is not enough. To determine whether an action is barred [**29] by *res judicata*, the Fifth Circuit holds that a court should consider "whether the prior judgment was rendered by a court with proper jurisdiction, whether there was a final judgment on the merits, that the parties are identical in both actions, and

that the same cause of action is involved in both suits." ***Rhoades**, 196 F.3d at 602*. The Court agrees with AT&T and finds that *res judicata* applies to the PUC's orders and Arbitration Award in 33323 because (1) the PUC's award is a final judgment on the merits by an administrative agency of competent jurisdiction; (2) UTEX and AT&T were both parties to the proceedings; and (3) UTEX is attempting to raise the same claims as were raised or could have been raised in the first action.

In order to assert the bar of collateral estoppel, the party must show that: (1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action. ***Sysco Food Servs. Inc. v. Trapnell**, 890 S.W.2d 796, 801 (Tex. 1994)* (citing ***Allen v. McCurry**, 449 U.S. 90, 94-95, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980))* (additional citations omitted). [**30] The Court finds that the facts have not changed with regard to the order issued by the PUC in Docket 33323, those facts were essential to the finding by the PUC, and that it is the same parties before the Court now as was before the PUC in Docket 33323. Therefore, Docket 33323 is to be given preclusive effect by the Court.

3. Section 4.3 of the ICA

UTEX argues that the express terms of the parties' ICA eliminates all interconnection and inter-carrier "charges" upon termination of the agreement and thus AT&T is not entitled to any sums based upon its interconnection or inter-carrier billings. UTEX asserts that when the current ICA is terminated, all amounts claimed by AT&T on both a pre-petition and post-petition basis will be extinguished under Section 4.3 of the existing ICA. Section 4.3 of the ICA states:

> Upon termination of this Agreement, CLEC's liability will be limited to payment of the amounts due for Network Elements, Combinations, Ancillary Functions and Resale Services provided up to and including the date of termination and thereafter as reasonably requested by CLEC to prevent service interruption, but not to exceed one (1) year. The Network Elements, Combinations, Ancillary [**31] Functions and Resale services provided hereunder are vital to CLEC and must be continued without interruption. When CLEC provides or retains another vendor to provide such comparable Network Elements, Combinations, Ancillary Functions or Resale services, SWBT and CLEC agree to cooperate in an orderly and efficient transition to CLEC or another vendor. SWBT and CLEC further agree to coordinate the orderly transition to CLEC or another vendor such that the level and quality of the Network Elements, Combinations, Ancillary Functions and Resale Services is not degraded and each Party will exercise its best efforts to effect an orderly and efficient transition.

Docket no. 188, Ex. A, § 4.3 (hereinafter "ICA"). As discussed above, the purpose of Docket 26381 is to establish the terms for a replacement ICA between AT&T [*563] and UTEX, so the termination of the current ICA appears imminent. Additionally, UTEX points to section 44.1 of the ICA, titled "Survival of Obligations." That section of the ICA states:

> Any liabilities or obligations of a Party for acts or omissions prior to the cancellation or termination of this Agreement, any obligation of a Party under the provisions regarding indemnification, [**32] Confidential Information, limitations on liability, and any other provisions of this Agreement which, by their terms, are contemplated to survive (or to be performed after) termination of this Agreement, will survive cancellation or termination thereof.

ICA, § 44.1. UTEX argues that it is clear from the express terms of Section 4.3 that upon termination, liability will be limited only to those named in the ICA, and that interconnection and intercarrier compensation are not specifically mentioned. Therefore, UTEX argues, when the agreement terminates, AT&T's pre and post-petition claims will be extinguished.

In response, AT&T argues first that the charges due AT&T are charges incurred by UTEX under the *existing* ICA; there is currently no replacement agreement in force, so this argument is effectively premature. Additionally, AT&T argues that its proof of claim

includes the approximately $3.77 million awarded as a result of Docket 33323, and that UTEX cannot collaterally attack this award, as UTEX's "defense" of section 4.3 of the ICA was available to UTEX at the time the parties argued before the PUC.

AT&T next argues that UTEX's reading is not plausible as a contract "must be interpreted [**33] in a manner that 'will avoid when possible and proper a construction which is unreasonable, inequitable, and oppressive'" (docket no. 188, p. 34) (quoting ***Frost Nat'l Bank v. L & F Distribs., Ltd.***, *165 S.W.3d 310, 312 (Tex. 2005))*. AT&T alleges that the purpose of Section 4.3 of the ICA was to allow for post-termination continuation of telecommunication services for a certain period of time during a transition in order to prevent service disruption which would be detrimental to the CLEC and its end-users. The provision provides for the continuation of the listed services; it does not wipe away existing payment obligations for other services.

AT&T next points to Section 44.1 of the ICA to argue that any liabilities or obligations of a party for acts or omissions prior to the cancellation or termination of the ICA will survive cancellation or termination. *See* ICA, § 44.1. AT&T states that there is a list in Section 44.1, and each item is separate and distinct and will survive termination.

AT&T makes several grammar related arguments in its Motion to Dismiss which the Court finds unnecessary to delve into (see docket no. 188, p. 36-37). Additionally, AT&T argues that a retroactive application [**34] of a prospective ICA to terminate AT&T's existing contract rights would violate the *Contracts Clause of the United States Constitution* as well as the *Contracts Clause* and prohibition against retroactive laws in the Texas Constitution. The Court finds no reason to go into these arguments either.

UTEX responded by arguing that the ICA is clear on its face and that AT&T is merely attempting to inject ambiguity. UTEX argued that AT&T's "unfair", "unjust", or "illegal" arguments deserve no consideration. UTEX additionally responded to AT&T's argument that UTEX waived this argument by not raising it during the Docket 33323 proceedings by arguing that the current ICA is a result of arbitration by the PUC, so any attack on the wording of the contract is also an impermissible collateral attack on the PUC.

[*564] After reviewing the arguments of AT&T and UTEX, the most convincing, and this Court finds controlling, argument is the plain meaning of the contract. The reading UTEX advocates would hypothetically allow for a party to never pay a bill over a period of years, dispute any bills it received, have arbitrators find the party liable for millions of dollars in unpaid bills, and then that party declare [**35] bankruptcy, choose to reject the contract, and suddenly be free of these unpaid obligations. Additionally, UTEX's reading of the contract is unclear as to how the contract would handle a situation involving, for example, indemnification. Indemnification is listed in Section 44.1 as a liability that survives cancellation of the ICA, but is not listed in Section 4.3. At best, the ICA is ambiguous as to what obligations may survive termination. The Court is not tasked with making that determination this day. The Court has been tasked with determining whether, by operation of the existing ICA, all obligations owed by UTEX to AT&T for intercarrier and interconnection compensation will be wiped away. The Court finds that the ICA will not operate in this manner. Thus, UTEX's argument to this effect fails as a matter of law.

4. Meet Point Billing

UTEX alleges that all of AT&T's post-petition access billings to UTEX are disallowed due to AT&T's refusal to engage and provision MPB for all "access" traffic. UTEX alleges that AT&T has refused to work with UTEX on establishing MPB. Because AT&T has refused to let UTEX establish this type of system, UTEX is forced to continue routing their calls in [**36] a manner which results in higher bills. UTEX points to page 117 of the Arbitration Award in Docket 33323 to argue that "the Arbitrator also made it perfectly clear that -- consistent with the interconnection agreement -- Debtor could request establishment of meet point billing trunks and the parties were required to engage in joint network planning and establish a separate set of trunk groups" (docket no. 187, p. 28-29). The Court is unaware where UTEX hears the Arbitrator say this, let alone where the Arbitrator makes it perfectly clear.

Nonetheless, there appears to be a dispute concerning whether there were MPB trunks between UTEX and AT&T. UTEX argues this "revelation clearly warrants discovery and a hearing on the facts" (docket no. 199, p. 31). UTEX asserts that it has attempted to meet with AT&T to work towards establish MPB, but

those efforts have not been fruitful. Quizzically, UTEX then discusses AT&T's assertion that UTEX is not entitled to MPB as being odd because "[i]f, as AT&T claims, UTEX is not entitled to MPB, then why did AT&T establish those trunks it told the PUC did not exist but then told the Court do in fact exist"" *Id.* at 32. This is odd because, as discussed in [**37] the previous paragraph, it was UTEX who was responsible for establishing the MPB trunks. This does not appear relevant to the current issue, just an example of the confusion UTEX has injected into this case.

In AT&T's Motion for Summary Judgment, AT&T explains what MPB is:

> Meet Point Billing can occur when access services is provided by more than one company. It is used when access charges are levied by two or more Local Exchange Companies for the processing of an InterLATA telephone call (i.e., a long distance call) by an IXC. The two Local Exchange Companies then jointly bill the third party IXC for access charges.

Docket no. 188, p. 43 (internal citations omitted). AT&T additionally explained what is required for MPB:

> Meet Point Billing arrangements require that the CLECs [sic] customers be [*565] Interexchange Carriers ("IXCs") and the traffic, therefore, be to or from an IXC. An IXC is a telecommunications company that carries interLATA communications, i.e., a long distance telephone company. In addition, a Meet Point Billing arrangement requires certain data exchange between the CLEC and AT&T Texas with respect to the IXC--most importantly the IXC's Carrier Identification Code (the "CIC")--so [**38] that the parties can bill and collect access charges from the IXC.

Id. at p. 42 (internal citations omitted). At the time of the Docket 33323 award, UTEX claimed none of its customers were IXCs. Docket 33323, p. 47. As such, the Court agrees with AT&T that, under the terms of the ICA, UTEX did not meet the requirements to establish MPB at the time of the Docket 33323 award.

UTEX alleges that they are attempting to establish jointly provided trunks and intend to directly serve IXCs that hold out as IXCs, and to implement a particular type of jointly provided access called "Feature Group A" that does not require a CIC that can be used by both carriers and non-carriers. UTEX alleges that AT&T is obstructing UTEX's efforts to implement this.

AT&T described Feature Group A ("FGA") as:

> An old line-side access method usually implemented such that an end-user has to dial a local telephone number, then after being connected to a long distance carrier, it gets a second dial tone, and then is required to enter some identifying information (such as a passcode) and the desired long-distance number.

Docket no. 200, p. 11-12. AT&T states that UTEX first brought up FGA on January 21, 2011, and AT&T timely [**39] responded on February 9, 2011 by requesting the necessary information in order to properly implement FGA. AT&T argues this is irrelevant anyway, since this has nothing to do with outstanding charges. This is true, but UTEX is making this argument pursuant to AT&T's motion for allowance of administrative claims, so it is relevant to some of AT&T's post-petition billings. However, the Court finds, based on the above discussion, that UTEX has not shown they have met the requirements for MPB. Telling is the argument in Debtor's Motion for Summary Judgment where it discusses how it has attempted to work with AT&T to mitigate charges, and AT&T has responded by explaining why UTEX's proposed methods will not work. [2] AT&T has responded to UTEX with regards to MPB, and it appears, as AT&T puts it, UTEX just does not like what AT&T has to say. For these reasons, the Court does not find that AT&T's post-petition billings should be disallowed for AT&T's alleged failure to establish MPB.

2 The example UTEX gives is:

> For example, UTEX interprets Skype traffic to be ESP local. Notwithstanding UTEX's understanding of this fact, UTEX has offered to AT&T in MPB meetings to route such traffic over MPB trunks [**40] if AT&T believes it incurs an access charge.

> AT&T, however, has correctly pointed out that Skype traffic does not have IXC identifiers. The result, according to AT&T engineers, is that such traffic cannot be routed using MPB.

Docket no. 187, p. 28.

5. Offsets

UTEX asserts that AT&T's claims should be disallowed because UTEX is owed an offset from AT&T. UTEX argues that if and to the extent there has been any traffic that was Public Switched Telephone Network ("PSTN") originated and handled by an IXC, then its tariffs [*566] impose an access charge just as do AT&T's. If and to the extent "the numbers" control rating as AT&T contends, [3] then "the numbers" reveal that AT&T is the responsible originating carrier -- to UTEX -- for the access charge. UTEX goes on to say that for every call that AT&T proves was PSTN-originated and handled by an IXC there must be a further inquiry to determine if "the number" (the telephone number of the caller who made the call) is an AT&T number. UTEX states that its analysis shows that AT&T itself is the largest entity that would owe access charges to UTEX. UTEX posits that what UTEX refers to as the "AT&T family" is liable to UTEX for $3,262,516 for the access charges [**41] under UTEX's "OCN billing" calculations. The amount of OCN liability, UTEX argues, is directly related to the amount of traffic that is found to be "PSTN-originated" and "handled by an IXC"--which are two criteria of any obligations under the Docket 33323 result. UTEX concludes by saying that before it should be required to pay anything to AT&T, this Court must first determine how much AT&T owes Debtor in OCN billings.

3 And this Court found above.

AT&T responds to these arguments first by saying that UTEX's theory that if the CPN is an "AT&T number," then an AT&T entity would be the originating carrier is a fallacy because with telephone number portability, that telephone number could be with an end-user that is now a customer of another telecommunications provider.

AT&T next discusses how UTEX sent demand letters to AT&T affiliates in the summer of 2009, after the PUC issued its arbitration award in June 1, 2009. AT&T says they have cause to believe that UTEX sent these demand letters to numerous other Local Exchange Carriers making the same OCN claims. UTEX lists these claims on their Amended Schedules at Schedule B-2, totaling over $10 million for the OCN claims UTEX is making against [**42] AT&T and other providers (docket no. 71). AT&T argues that these claims have no basis in law or fact, in that AT&T is unaware of any other telecommunications company making such claims, and that not a single Local Exchange Carrier has paid UTEX for these claims. AT&T states that there is no basis for UTEX to go outside Texas for access charges for a call that is handed off to UTEX prior to the date of its OCN billing in 2009.

AT&T's next argument is that a claim objection proceeding is not the proper forum in which to raise a separate alleged counterclaim by UTEX against AT&T or its affiliates. AT&T states that until the claims are finally adjudicated in some forum, the mere allegation of such claims, standing alone, does not invalidate AT&T's pre or post-petition claims against UTEX. AT&T is correct in arguing that UTEX's argument is no reason to hold up payment of an administrative claim. The Fifth Circuit holds that a bankruptcy court need not consider defenses to a creditor's claim, because the issue before a court in determining if a creditor is entitled to an administrative expense is whether the creditor has met its burden of proving that the service benefited the bankruptcy [**43] estate. ***Toma Steel Supply, Inc. v. TransAmericanNatural Gas Corp. (In re TransAmerican Natural Gas Corp.)****, 978 F.2d 1409, 1419 (5th Cir. 1992)*. The claims for offset are relevant in making the determination of whether the services provided by the creditor are beneficial to the estate, but a court need not go into a full evidentiary hearing in order to rule solely on the creditor's right to an administrative expense. *Id.*

[*567] AT&T next argues that UTEX's claims for offsets based on OCN billing is based on UTEX's shifting arguments. UTEX claims in some arguments that its traffic does not originate on the PSTN, but rather originates on the internet as "ESP" traffic, but in UTEX's offset argument, UTEX argues that the traffic *did* originate on the PSTN with Local Exchange Carriers. [4]

4 UTEX's response is that they are making this offset argument based on AT&T's interpretation of the Docket 33323 award, and this offset billing

> is just the natural consequence of AT&T prevailing in its arguments.

AT&T also argues that UTEX has failed to provide any description regarding the "services" that UTEX claims it provided to AT&T or its affiliates. UTEX responds by saying that AT&T [**44] is well aware of one offset--the OCN billing discussed above--and there is another offset related to the 26381 Arbitration. UTEX asserts that AT&T has failed to load "500" numbers. UTEX states that under the Docket 33323 Award, UTEX is not allowed to send bills for AT&T breaches, and must establish through alternative means and measures the amounts due from AT&T to UTEX for these breaches. One specific Interconnection duty AT&T has breached pre-petition and continues to breach post-petition is its blocking of routing UTEX "500" numbers. UTEX asserts that it should be entitled to an offset for any Interconnection charges after the Docket 33323 award for the breaches AT&T has committed by not allowing routing of "500" numbers. As discussed above, and argued by AT&T, as this involves Docket 26381, a non-final arbitration involving a new ICA between the parties, this argument is not relevant to the charges owed by UTEX under the current ICA.

AT&T is correct that this is not the appropriate way to bring a right of setoff. Setoff is treated as a form of counterclaim for procedural purposes. *See* ***Security Pac. Natl Bank v. Enstar Petroleum Co. (In re Buttes Res. Co.)***, *89 BR. 613, 615 (S.D.Tex. 1988)*. [**45] In objecting to a claim by a creditor, a party in interest shall not include a demand for relief of a kind specified in *Bankruptcy Rule 7001*, but may include the objection in an adversary proceeding. *FED. R. BANKR. P. 3007(b)*. *Bankruptcy Rule 7001* states that "a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § *554(b)* or *§ 725* of the Code, *Rule 2017*, or *Rule 6002*" constitutes an adversary proceeding. *FED. R. BANKR. P. 7001(1)*. In order to commence an adversary proceeding, a party must file a complaint with the court. *FED. R. BANKR. P. 7003*. Procedurally, AT&T is correct. An objection to claim is the improper outlet for raising a claim of set off. Therefore, the Court finds that UTEX's arguments for a right to setoff, for both pre and post-petition claims by AT&T, are denied as a matter of law.

6. Administrative Claim

UTEX, citing to ***In re DVI, Inc.***, *308 B.R. 703, 708 (Bankr. D.Del. 2004)*, argues that an administrative claim under *11 U.S.C. § 503(b)* need not be paid immediately, but can be paid as late as the confirmation date. UTEX asserts that the question of immediate payment of allowed [**46] administrative expense is governed by the rule that applies to all administrative expense claims asserted under *§ 503(b)*; that is, that "the time of payment of administrative expenses is within the discretion of the bankruptcy court." ***In re Am. Res. Mgmt. Corp.***, *51 B.R. 713, 719 (Bankr. Utah 1985)*. UTEX cites to Norton to argue bankruptcy courts have discretion [*568] in determining if the debtor must pay immediately. 2 NORTON BANKR. L. & PRAC. 2D § 42:14 ("In most situations the courts prefer to postpone payment of the administrative claim until after confirmation of a plan or the distribution in a liquidation. However, once a claimant has requested payment, the court may exercise its discretion whether circumstances warrant immediate response."). Therefore, argues UTEX, the Court has discretion whether to order immediate payment or not.

Additionally, UTEX argues that AT&T did not provide a "service" and the "benefit" to the Estate is not equal to AT&T's incorrect billings. UTEX makes it clear it is not arguing that having service is vital to the conduct of its business. UTEX is denying that AT&T has provided any "service" to UTEX; instead, AT&T is merely fulfilling a statutory duty that [**47] was then contractualized through the ICA. This argument by UTEX essentially turns into another variation on their arguments that AT&T has misapplied the Docket 33323 result and the Order on Reconsideration. UTEX states that:

> The dispute between the parties is, was, and likely will always be how certain traffic is rated under the Communications Act and then the ICA. The argument is the amount of "value" that accrued to the estate, and that value is best measured by what the ICA -- as *interpreted by the PUC in Docket 33323* (for now, pending UTEX's "appeal") -- says is the applicable and proper price for transport and termination.

Docket no. 199, p. 44-45 (emphasis in original). However, the Court has already ruled on what it finds is the correct interpretation of Docket 33323 and the Order

on Reconsideration, and therefore there is no dispute over the appropriate way to rate traffic.

Finally, UTEX argues that the parties disagree over what the contract rate "is" for traffic with CPN that does not originate on the PSTN and UTEX asserts that AT&T is not calculating its bills in the PUC approved method. As the Court has ruled on the issue of the interpretation of Docket 33323 and the Order on [**48] Reconsideration, the Court finds that there have been no changes to the Docket 33323 result and that, as the parties say, "the numbers control."

In response, AT&T cites to *Section 364(a) of the Bankruptcy Code*, which states:

> If the trustee is authorized to operate the business of the debtor under section 721, 1108, 1203, 1204, or 1304 of this title, unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under *section 503(b)(1)* of this title as an administrative expense.

AT&T devotes several pages in its Response to Debtor's Motion for Summary Judgment arguing that AT&T is entitled to an administrative expense (see docket no. 197, p. 24-28). AT&T argues that the administrative expense priority granted by *section 364(a)* is automatic. COLLIER ON BANKRUPTCY 503-37 ¶ 503.06[5][b] (16th ed. rev. 2010). AT&T continues citing Collier to say that "[a]s long as the obligation was incurred in the ordinary course of the debtor's business and as long as the expense fits generally within the =actual, necessary' standard applicable to all *section 503(b)(1)* administrative expense, the debt will be entitled to treatment [**49] as an administrative priority." *Id.* AT&T argues that by continuing to pass traffic to AT&T post-petition, UTEX has incurred obligations to AT&T Texas under the ICA. Quoting the Supreme Court:

> [*569] If the debtor-in-possession elects to continue to receive benefits from the other party to an executory contract pending a decision to reject or assume the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services, which, depending on the circumstances of a particular contract, may be what is specified in the contract.

N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 531, 104 S. Ct. 1188, 79 L. Ed. 2d 482 (1984)* (internal citations omitted). According to the Fifth Circuit, claims qualify as an "actual and necessary cost" under *section 503(b)(1)(A)*, where a claim arises post-petition and as a result of actions taken by the trustee that benefitted the estate. ***Total Minatome Corp. v. Jack/Wade Drilling, Inc. (In re Jack/Wade Drilling, Inc.)****, 258 F.3d 385, 387 (5th Cir. 2001)* (citing ***In re TransAmerican Natural Gas Corp.****, 978 F.2d at 1417* (finding that a "*prima facie* case under *§ 503(b)(1)* may be established by evidence that (1) the claim arises from a transaction with the debtor-in-possession; and [**50] (2) the goods or services supplied enhanced the ability of the debtor-in-possession's business to function.") As for the reasonable value of the services, UTEX is not challenging the contract rate, it is challenging the classification of traffic type, and this Court has already rejected this argument.

Based on the above discussion, the Court finds that AT&T is entitled to an administrative expense for the ongoing use of its services by UTEX. Having found that AT&T's interpretation of Docket 33323 and the Order on Reconsideration to be the correct interpretation, the contract rate at which AT&T has been billing UTEX is correct. As for the timing of the payment, the Court agrees with UTEX that payment need not be immediate, but the Court has discretion on the timing, but the claim must be paid on the effective date of the plan. *See* COLLIER ON BANKRUPTCY 503-13 ¶ 503.03[1][b]. AT&T discusses three factors a court should look at in exercising its discretion over timing: (1) the prejudice to the debtors, (2) the hardship to claimant, and (3) potential detriment to other creditors. ***In re TI Acquisition, LLC****, 410 B.R. 742, 746 (Bankr. N.D.Ga. 2009)* (citing ***In re Global Home Prods., LLC****, 2006 Bankr. LEXIS 3608, 2006 WL 3791955 (Bankr. D.Del. Dec. 21, 2006))*. [**51] Based on these factors, the Court finds that the claim need not be paid immediately.

7. Requiring UTEX to Immediately Assume or Reject or to Allow AT&T to Terminate the ICA

AT&T argues that the Court should require UTEX to assume immediately or reject the ICA, or, alternatively, grant AT&T relief from the automatic stay in order to suspend and terminate the ICA (see docket no. 148, p.

10-11). AT&T acknowledges that, under *Section 365(a) of the Bankruptcy Code*, a debtor may assume or reject any executory contract or unexpired lease. AT&T argues that a debtor's ability to assume or reject is not unlimited. *Section 365(d)(2)* provides that:

> In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

AT&T argues that such relief is necessary so that AT&T does not continue to suffer pecuniary losses as each day passes.

UTEX responds [**52] to this argument by stating that AT&T provides no justification for shortening the time period under *365(d)(2)*. UTEX discusses the progress [*570] in Docket 26381 and the work with the PUC in establishing a new ICA between AT&T and UTEX, which is still, to this Court's knowledge, being negotiated. UTEX argues that AT&T has deliberately spent ten years trying to stop UTEX from getting a replacement agreement, and cannot delay the new agreement with one hand, and argue for the rejection of the current ICA with the other. [5]

> 5 Additionally, UTEX posits that "AT&T and *certain elements at the TPUC* are apparently playing 'keep-away' out of the hope the clock will run and UTEX will end up with neither the current agreement nor a replacement agreement" (docket no. 187, p. 37 (emphasis added)). Having been referred by the parties countless times to the Order on Reconsideration, the Court has read the PUC's discussion under the heading "Standards of Conduct." *See* Order on Reconsideration at 6-8.

AT&T argues that the Court should lift the stay and allow AT&T to suspend and terminate the ICA due to the debtor's post-petition breach thereof. AT&T states that courts have held that a debtor's failure to make [**53] post-petition payments constitutes "cause" for relief from the stay and have allowed a non-debtor party to terminate contracts where there was no possibility the debtor was able to perform under the ICA (docket no. 148, p. 11 (internal citations omitted)). AT&T discusses a test for showing a *prima facie* case to support the cause for relief from the automatic stay. *See* ***In re Milstein***, *304 B.R. 208, 212 (Bankr. E.D. Pa. 2004)* (internal citations omitted). The *prima facie* case, according to the case cited by AT&T, must include "(1) a showing of an obligation owing by the debtor to the creditor; (2) a valid security interest as to which relief from stay is sought, (3) the cause justifying relief from stay, such as the post-petition or post-confirmation default." *Id.* The Bankruptcy Code defines a "security interest" as a "lien created by an agreement." *11 U.S.C. § 101(51)*. It appears the case cited by AT&T deals with lifting the stay for a secured creditor. [6] AT&T additionally cites to ***In re U.S. Brass Corp.***, *173 B.R. 1000 (Bankr. E.D.Tex. 1994)*. That case held:

> Relief from the automatic stay will be granted to an unsecured creditor, such as Shell and Celanese, only when the "balance of [**54] hardships" tips in the creditor's favor. When balancing the hardships in lifting the stay, the most important factor is the effect of such litigation on the administration of the estate; even slight interference with the administration may be enough to preclude relief.

Id. at 1006 (internal citations omitted). Here, the Court believes that lifting the stay and allowing AT&T to cancel the ICA will be a death sentence to UTEX. While the Court understands AT&T's arguments, the Court finds that, in balancing the hardships, the stay should not be lifted.

> 6 AT&T filed its proof of claim as a secured creditor by virtue of a right of setoff "against any claim brought against AT&T Texas by the Debtor, the debtor-in-possession, any trustee or any estate representative, including, but not limited to any claims for reciprocal compensation, refunds, and billing disputes" (claim no. 15).

Based on the above discussion, the Court finds that AT&T's request to lift the stay should be denied. However, the Court does find cause to compel UTEX to

accept or reject the ICA. The Court finds UTEX shall have 21 days from the date a new agreement is reached between AT&T and UTEX, pursuant to Docket 26381, to accept [**55] or reject the ICA.

8. The Sufficiency of AT&T's Proof of Claim

UTEX objects to AT&T's pre and post-petition claims on the basis that [*571] the claims lack sufficient documentation to meet the evidentiary requirement of *Bankruptcy Rule 3001(c)*, and thus fails to establish the factors required under applicable law for claims based upon a writing. AT&T responds by stating that UTEX has the ICA, the PUC award and subsequent orders, and has all of AT&T's invoices constituting the basis for the claims. While AT&T's Proof of Claim did not contain all of this information, it gave a summary and offered to furnish copies of the agreements, orders, awards and other relevant documents upon request (see Claim 15). The Motion for Payment of Administrative Claim similarly lays out the relevant facts and includes a spreadsheet documenting their invoices (see docket no. 148). Based on the provided information, the Court finds the Proof of Claim sets forth the facts necessary to support the claim, and is therefore *prima facie* valid. [7]

7 Collier does discuss the situation where the original proof of claim contains only summary information and lacks the documentation necessary to establish a *prima facie* validity. [**56] *See* COLLIER 3001-27 ¶ 3001.09[1]. Under this type of situation "the claimant may have the burden of establishing its claim for the excess amounts...if it is these types of charges which represent the challenged amount." *Id.* at 3001-27-28. While UTEX could argue that AT&T only provided summary information, the "summary information" AT&T provided explains the history and bills sufficiently to establish *prima facie* validity.

B. Factual Disputes

At the outset, it should be noted that a proof of claim is afforded *prima facie* validity under *Bankruptcy Rule 3001(f)*, and this Court found above that AT&T's Proof of Claim is to be afforded *prima facie* validity.

1. AT&T Changing the Method of Calculating No-CPN

The crux of UTEX's argument here is that after UTEX filed its bankruptcy petition, UTEX changed its practices so that it met the 90% threshold as required by the ICA, which means there should have been no charges for no-CPN traffic. UTEX asserts that they met this threshold in March 2010, and communicated this to AT&T. UTEX states that AT&T initially disputed this contention and told UTEX the bills were perfect, but then issued an adjustment purporting to remove invalid CPN charges for June [**57] 2010 through September 2010. UTEX argues that their challenge to the bill ultimately resulted in AT&T admitting to billing errors. This, UTEX claims, casts sufficient doubt on AT&T's proof of claim to destroy the *prima facie* validity afforded to proofs of claim under *Bankruptcy Rule 3001(f)*, for "clearly AT&T's billings after September 2007 are indeed not so perfect after all" (docket no. 187, p. 13). UTEX argues that AT&T must "start at ground zero and prove up every penny it claims it is entitled to receive." *Id.*

UTEX next argues that AT&T has changed its billing methods from that approved by the Docket 33323 Arbitrator. UTEX asserts that AT&T admitted to UTEX that AT&T deviated from the method of calculating whether the 10% threshold has been met. AT&T had testified to the PUC that it performed the 90% threshold calculation by hand, with individuals running a query against the interconnection usage, which is calculated monthly from the first of the month to the last day of the month (docket no. 187, p. 15 (quoting docket no. 187, Ex. 6)). UTEX asserts that during a meeting between the parties prior to the filing of the Motion for Summary Judgment, AT&T admitted it was performing [**58] the threshold calculation on a quarterly basis. UTEX asserts that [*572] the overages AT&T corrected for the adjustment were a result of AT&T's change from the prior "every month manual" practices that AT&T described to the Arbitrator and that she approved in the Award of Docket 33323. Therefore, according to UTEX, there should be discovery and a contested hearing on AT&T's proof of claim.

AT&T responds by arguing that UTEX's assertion that AT&T has changed its methods of calculating no-CPN/invalid-CPN lacks any factual support. AT&T asserts they made no changes to the method of calculating the amounts owed for purposes of the invoices for all usage after September 2007.

UTEX responded to AT&T's Response to UTEX's Motion for Summary Judgment by stating that AT&T

misrepresents UTEX's arguments. UTEX asserts they are merely requesting that AT&T provide enough information for it to validate AT&T's calculations. UTEX argues that AT&T will not "break out" how much of its billing for post-September 2007 relate to "invalid CPN" billings. UTEX additionally argues that AT&T is no longer monitoring CPN delivery on a monthly basis. UTEX presents the testimony of an AT&T witness stating that "AT&T Texas [**59] reviews this [CPN delivery] data monthly to determine if UTEX is passing CPN as required. AT&T Texas determines the total number of messages a CLEC routed to the AT&T Texas local interconnection network over a calendar month" (docket no. 201, p. 14 (quoting testimony given by Mr. Cole to the PUC)). UTEX additionally presents testimony by its other representatives, including Mr. Dignan, where AT&T representatives purportedly told the PUC that it does the threshold check every month. UTEX asserts that the new invoices are not for traffic during a "calendar month." They assert that UTEX's invoices include traffic beginning on the 5th of each month through the 4th of the next. Because AT&T is not following the calendar month, according to UTEX, AT&T's invoices are wholly inconsistent with the ICA requirement as interpreted by the PUC in Docket 33323. They are not in accord with the ICA or Docket 33323 and cannot be accepted as valid for any purpose.

AT&T argues that their bills are in the industry standard format that was approved and validated by the PUC. AT&T asserts that nothing has changed since the Docket 33323 Award. AT&T argues that UTEX's argument about it changing the method with [**60] respect to the determination of whether the monthly 90% CPN threshold is met is a misrepresentation of the record and the arbitration award. AT&T argues that UTEX is confusing two issues - (1) the relevant monthly measurement period for determining the percentage of no-CPN calls and (2) the frequency with which AT&T reviews the data to determine whether UTEX or other CLECs are meeting the 90% threshold. What the Arbitrator found was "that a calendar month should be the measurement period to determine whether the percentage of calls passed with CPN is less than 90%." Docket 33323 at 125. The question the Arbitrator was answering was "[w]hat is the measurement period to determine whether the 'percentage of calls passed with CPN['] is less than 90%?" *Id.* at 124. The Court interprets this language to require AT&T to look at the calls passed during a calendar month as the relevant period in assessing if UTEX met the 90% threshold. The Award says nothing about how often AT&T must review that data to determine whether UTEX met the threshold. AT&T asserts that it performs a manual review of the monthly period on a quarterly basis. The Court therefore agrees with AT&T's [*573] argument that UTEX is [**61] confusing two separate issues.

This interpretation also resolves the issue over the credit UTEX received. AT&T asserts that they were reviewing the CPN data on a quarterly basis. Upon their quarterly review, they noticed that for the calendar month of June 2010, UTEX met the monthly 90% threshold. By meeting this threshold, non-CPN calls passed by UTEX would automatically be deemed local, and free of access charges going forward. Because AT&T had charged UTEX for the non-CPN calls passed by UTEX for the quarter, AT&T issued a credit to UTEX.

AT&T additionally points out that UTEX submitted no evidence that there is anything incorrect about AT&T Texas' pre and post-petition invoices. UTEX has responded by stating that they need more information to reconcile AT&T's invoices with UTEX's records. According to AT&T, their bills have not changed since the Docket 33323 Award. AT&T asserts the bills are in the industry standard format that was approved and validated by the PUC. Assuming this is correct, it is worth reviewing the Arbitrator's decision in respect to the issue of whether AT&T provided sufficient call detail to quantify any amounts that may be owed. *See* Docket 33323 at 125-127. [**62] AT&T stated that in response to UTEX's requests at the time of the Arbitration Award, AT&T had provided various information to UTEX. *Id.* at 126-27. AT&T additionally claimed that even if AT&T had not provided UTEX with the information, UTEX had its own Call Detail Records ("CDRs") that it could use to reconcile the invoice or to show that the invoices are consistent with the UTEX CDR. *Id.* at 127. In coming to its decision, the Arbitrator found that AT&T provided sufficient call detail to UTEX, but additionally noted "that UTEX can use its own CDRs to reconcile the AT&T Texas bills." *Id.* UTEX responded by saying that it has reviewed its own CDRs and that review revealed "significant discrepancies between [UTEX's] CDRs and AT&T's invoices" (docket no. 199, p. 39). UTEX asserts they observed "significant discrepancies" with regard to both "invalid CPN" charges and for traffic they assert is "ESP" traffic that should not incur an access charge. [8] UTEX states that it was a review of their CDRs that

allowed UTEX to determine that AT&T was imposing invalid CPN charges for months when UTEX met the 90% threshold. UTEX asserts that the parties still disagree over the quantification of AT&T's [**63] credit for the months where AT&T issued a credit. However, UTEX submits no evidence for how or why they dispute the credit.

8 The Court, however, has ruled that UTEX's arguments regarding ESP are incorrect.

UTEX makes the argument that AT&T's bills have undergone changes in procedure, which in turn has resulted in erroneous billing, which in turn destroys any credibility of AT&T's invoices and are therefore not sufficient to meet the requirements of *Bankruptcy Rule 3001(c)* and *(f)*. Having found that AT&T's bills are sufficient to be given *prima facie* validity, the Court finds that UTEX presents no evidence sufficient to show that AT&T has changed its bills in order to cast doubt on the bills, requiring the burden to be shifted to AT&T to prove up their bills. The Court therefore finds AT&T's proof of claim survives the attack on its validity based on UTEX's assertion that the billing methods have changed and there is therefore no need for discovery or a trial.

2. The Date UTEX Began Meeting the Required Percentage of CPN

UTEX asserts that "the parties dispute when UTEX crossed that line" (docket no. [*574] 199, p. 14). However, UTEX provides no evidence that they began meeting the required threshold [**64] at a different date. UTEX asserts they have a reasonable basis to dispute this claim, based on their other arguments for AT&T's bills being invalid, which the Court has already dismissed. Having already held that UTEX's CDRs had given them sufficient information to refute AT&T's assertions, the Court, in the absence of any evidence to the contrary, finds that AT&T's proof of claim survives this attack on their validity as well.

3. The Necessity of a Factual Hearing

At the conclusion of its Motion for Summary Judgment, UTEX pleads for either a denial of AT&T's Proof of Claim or for a factual hearing to determine the appropriate amount. In this portion of their Motion for Summary Judgment, UTEX asserts the same arguments discussed above to account for a dispute over all "access usage" after November 2007. UTEX argues that AT&T has the burden of proving how much the Proof of Claim is related to "invalid CPN" charges that AT&T calculated in the same manner as was approved by the Award and confirmed by the Commission. Before any amounts can be approved, UTEX argues there "must be discovery and a hearing, and AT&T must present a witness and proper exhibits and be subject to cross-examination [**65] and through this process prove up its claims" (docket no. 187, p. 39). As discussed, UTEX has not presented sufficient evidence to overcome the *prima facie* validity afforded AT&T's proof of claim. The PUC found that AT&T's bills were in industry-standard format and that UTEX has sufficient information in its CDRs to compare to AT&T's bills to dispute those bills. UTEX has not done this and has therefore not overcome the *prima facie* validity afforded AT&T's claim, and therefore the Court finds no need for a factual hearing

CONCLUSION

Having gone through the facts of the case and considered the evidence and briefing submitted by the parties, this Court finds that the Court can rule on the parties' competing motions for summary judgment.

IT IS THEREFORE ORDERED that for the arguments that any administrative claim held by AT&T is not immediately payable, that UTEX should not be compelled to immediately assume or reject the ICA, and that the automatic stay should not be lifted to allow AT&T to suspend or terminate the ICA, Debtor's Motion for Summary Judgment (docket no. 187) is GRANTED;

IT IS FURTHER ORDERED that for all other requested relief, Debtor's Motion for Summary Judgment (docket [**66] no. 187) is DENIED;

IT IS FURTHER ORDERED that for the argument that any administrative claim held by AT&T is immediately payable, that UTEX should be compelled to immediately assume or reject the ICA, and that the automatic stay should be lifted to allow AT&T to suspend or terminate the ICA, AT&T's Motion for Summary Judgment (docket no. 188) is DENIED;

IT IS FURTHER ORDERED that for all other requested relief, AT&T's Motion for Summary Judgment (docket no. 188) is GRANTED;

IT IS FURTHER ORDERED that UTEX's Objection to Claim of Southwestern Bell Telephone Company d/b/a

AT&T Texas (docket no. 162) is DENIED;

IT IS FURTHER ORDERED that for the purpose of finding AT&T is owed an administrative claim, AT&T's Motion (A) for Allowance and Immediate Payment of [*575] Administrative Claims and (B) For Entry of An Order Compelling the Debtor to Immediately Assume or Reject the Interconnection Agreement with the Debtor and (C) For Relief From the Automatic Stay so that AT&T Texas May Suspend or Terminate the Interconnection Agreement (docket no. 148) is GRANTED;

IT IS FURTHER ORDERED that for all other requested relief, AT&T's Motion (A) for Allowance and Immediate Payment of Administrative Claims and [**67] (B) For Entry of An Order Compelling the Debtor to Immediately Assume or Reject the Interconnection Agreement with the Debtor and (C) For Relief From the Automatic Stay so that AT&T Texas May Suspend or Terminate the Interconnection Agreement (docket no. 148) is DENIED.

SIGNED this 21st day of September, 2011.

/s/ Craig A. Gargotta

CRAIG A. GARGOTTA

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT 4

In re UTEX Commc'ns Corp. (Bankr. W.D. Tex. 2012)

IT IS HEREBY ADJUDGED and DECREED that the below described is SO ORDERED.

Dated: March 05, 2012.

CRAIG A. GARGOTTA
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:	§	
	§	CHAPTER 11
UTEX COMMUNICATIONS CORP.,	§	
d/b/a FEATUREGROUP IP,	§	
	§	CASE NO. 10-10599-cag
Debtor.	§	

ORDER GRANTING MOTION TO CONVERT CASE TO CHAPTER 7

Came on to be considered AT&T Texas' Motion to Convert, the Debtor's Response thereto, and the supplemental pleadings filed by the parties in support of their respective positions. A hearing was conducted on AT&T's Motion on February 16, 2012 and February 28, 2012. For the reasons stated herein the Court GRANTS AT&T's Motion to Convert Case to Chapter 7.

The Court finds that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1344. This matter constitutes a core proceeding under 28 U.S.C. §157(b)(2)(A)(matters concerning the administration of the estate). Venue is proper under 28 U.S.C. §1408(1). This matter is referred to this Court under the District's Standing Order of Reference. This matter is further defined as a contested matter under Federal Rule of Bankruptcy Procedure 9014. The

following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

FINDINGS OF FACT

1. UTEX filed a Chapter 11 proceeding on March 3, 2011. The last day to file an avoidance action under 11 USC § 546(a) is March 5, 2012.

2. UTEX's Statement of Affairs (AT&T Ex. 2) indicates:

   (a) $562,963.93 of payments were made to insiders within one year of filing bankruptcy.

   (b) $123,344.01 of payments were made to non-insiders within 90 days of filing bankruptcy.

3. The payments referenced above were generally paid in erratic amounts and not on scheduled dates. (Tr. pp. 21-27). The potential preference actions are colorable claims. Debtor does not intend to bring avoidance actions. (Tr. p. 22).

4. AT&T Texas has an allowed pre-petition claim of over $9.5 million. UTEX was insolvent during the year of filing bankruptcy. (See Amended Schedules) (Tr. 22).

5. Lowell Feldman, President of UTEX, was employed by the PUC in the early 1990s. Within two weeks of hire, Feldman was in a dispute with AT&T Texas and has been in disputes with AT&T Texas ever since. (2/16/2012 Tr. at 72-75). At the time of filing bankruptcy, UTEX had 9 legal disputes with AT&T Texas. (AT&T Ex. 2, pp. 4,5).

6. UTEX filed Chapter 11 to prevent AT&T Texas from enforcing the PUC decision in Docket 33323. (Tr. 20).

7. UTEX has never paid AT&T Texas for access services, either pre-petition or post-petition. (2/28 hearing).

8. During bankruptcy, UTEX has transferred $1,069,933.22 to insiders. (AT&T Ex. 71, Jan. 2012 MOR, pp. 1,2 ("Jan. MOR")).

9. UTEX's cash reserves have declined during the bankruptcy. At the end of March 2010, UTEX had $123,313.24 in cash reserves. (Jan. MOR, p. 3). At the end of January, 2012, UTEX had $3,119.45 in cash reserves; a decline of $120,193.79. (Jan. MOR, pp. 3-6).

10. UTEX's operating reports reflect insufficient cash flow to pay its ongoing expenses or service its debt. UTEX's total owner's equity or net worth as of the end of January 2012 was a negative $10,948,247.18.

11. The claims and assets of UTEX contained on UTEX's Claims Registry and Schedules show that UTEX performed poorly prior to filing bankruptcy. (AT&T Exs. 2, 20).

12. $60,000 in bonuses were paid in 2011 to Worldcall employees (AT&T Ex. 16), including a bonus to an employee whose primary work is for UTEX.

13. Net income for the reorganization is negative $534,972.75. Net income after interest, depreciation, etc. is negative $458,110.42. (Jan. MOR, p.20). Of this amount, $269,621.46 is unpaid access charges owing to AT&T Texas (*Id.* at 14). UTEX has negative net income of $188,488.96 even when the access charges owed to AT&T Texas are not considered.

14. UTEX has overpaid Worldcall under its Consulting Agreement by $109,419.35, calculated as follows:

$769,419.35	Amount actually paid to Worldcall
$660,000	Contractual amount owed to Worldcall
$109,419.35	Overpayment to Worldcall

(Jan. MOR; AT&T Ex. 3, Schedule A, AT&T Ex. 2, p. 3, question 3(b)). UTEX claims that the terms of the Consulting Agreement are a mistake and the contract date for reducing payment to $30,000 per month should not be April 1, 2010, as written but should, instead, be April 1, 2011. This claim is not supported by adequate evidence.

15. The proposed plan does not treat AT&T Texas as having a final judgment and PUC decision. Payment is delayed until UTEX's appeals are exhausted. All other creditors are paid before AT&T Texas receives payment on established debt.

16. The Jan. MOR shows a continuing decline in the business. UTEX gross revenues dropped from $101,266.25 in September 2011, to $48,055.84 in October 2011, $45,729.85 in November 2011, $53,673.34 in December 2011, and $83,616.41 in January, 2012. (Jan. MOR, p.2). The above gross income from October through December is from 3 or 4 customers. The total net income for September 2011 through January 2012, before depreciation, etc. was a negative $130,011.55, including a negative $14,764.68 for January. (Jan. MOR, p.2).

17. Between 85% and 90% of UTEX's revenues are from UTEX's insider/affiliate, WorldCall Internet. (2/28 hearing). Thus, UTEX's principal source of revenue is its own insider/affiliate. (*Id.*). UTEX's primary payments for operating expenses are to its parent company and to another insider/affiliate, Red Wing Partners. (Jan. MOR.)

18. The Jan. MOR shows a modest increase in accrued revenues, from $53,673.34 in Dec. 2011 to $83,616.41 in Jan. 2012. (Jan. MOR p.3.) This increase, the source of which is UTEX's own affiliate, does not indicate UTEX's prospects will improve. The $83,616.41 in accrued revenues are still well below what UTEX was averaging from March 2010 through Sept. 2011. (*See* Jan. MOR, pp. 1-2.) UTEX still operated at a loss in January 2012, showing a net loss for January 2012 of ($14,764.68) and a reduced cash balance of $3,119.45. (*Id.* at 3, 5.)

19. Non-insider unsecured claims, including AT&T Texas' $9.5 million, total $12,391,401. (AT&T Texas Ex. 20; Dkt. No. 60; p. 1.)

20. UTEX has not provided credible evidence that it can generate substantially more revenues under the new agreement approved by the PUC in Docket 26381.

21. The revenue projections in UTEX's proposed Disclosure Statement (AT&T Ex. 69), are dependent on AT&T Texas accepting UTEX's interpretation of the new agreement and UTEX's interpretation of the FCC's November 2007 Order on Intercarrier Compensation.

22. AT&T Texas has stated (2/22/2012 Mem. of Law, UTEX Ex. 10 at pp. 5-7) that it disagrees with UTEX's claims about both the new agreement and the FCC Order.

23. The parties' disputes over the meaning of the new agreement and the FCC Order are likely to lead to more litigation.

24. To date, UTEX has received adverse rulings in all 9 disputes that it listed as pending in its Amended Statement of Affairs. (AT&T Ex. 2; pp. 4, 5):

- Arbitration for new Interconnection Agreement in Docket 26381. The PUC rejected most of UTEX's requests, including virtually all of UTEX's requests for contract language submitted after the Award was issued. *See, e.g.*, UTEX Ex. 8 at p. 1 ("UTEX's request to include its proposed language is denied."); p. 5 (same ruling); p. 8 (same ruling); p. 14 (same ruling); p. 18 ("UTEX's request to include its proposed language is denied."); p. 34 (same ruling); p. 36 (same ruling); p. 37 (same ruling, twice); p. 39 (same ruling); p. 45 (same ruling); p. 47 (same ruling); p. 89 (same ruling); p. 93 ("The Arbitrators find that UTEX's proposed language

is inconsistent with the Award … ."); p. 96 ("UTEX's request to include its proposed language is denied."); p. 100 ("The Arbitrators agree with AT&T Texas and adopt its proposed language while rejecting that of UTEX."); p. 105 ("UTEX's request to include its proposed language is denied."); p. 120 (same ruling); p. 136 (same ruling); p. 144 (same ruling); p. 148 (same ruling); p. 154 (same ruling); p. 165 ("The Arbitrators find that UTEX's proposed language is not necessary to conform the ICA to the Award, and thus decline to adopt that language."); p. 170 ("UTEX's request to include its proposed language is denied."); p. 174 ("UTEX's request to include its proposed attachments are denied."); p. 175 ("UTEX's request to include its language is denied."); p. 183 ("UTEX's request to include its proposed language is denied."). *See also, e.g.*, UTEX Ex. 9 (Arbitration Award) at p. 36 (granting UTEX only the exemption for ESP traffic that already existed under "Existing law [that] provides a limited exemption from access charges for certain communications involving an ESP"); at p. 67 (requiring UTEX to pay AT&T Texas according to its ACIS tariff – "The Arbitrators conclude that UTEX must compensate AT&T Texas at the tariffed rate for communications subject to the ACIS provisions of AT&T Texas's tariff, as described in more detail below."); at p. 73 (limiting UTEX to providing transit only "if direct interconnection between AT&T Texas and the third party carrier is unavailable"); p.83 (rejecting UTEX's definition of "Customer"); p. 86 (defining End User so that "UTEX will ordinarily not be permitted to purchase UNE loops from AT&T Texas for provisioning to UTEX's ESP customers."); p. 93 (rejecting UTEX's position on resale); p. 103 (rejecting UTEX's claim that it did not have to purchase B-Links and LIDB from AT&T Texas at tariffed rates); p. 106 (rejecting "UTEX's proposed NIM § 1.4.5."); p. 111 (declining to award terms for ATM or SIP Signaling); p. 113 (rejecting UTEX's proposed language); p. 116 (rejecting UTEX's request for special terms for collocation); p. 118 (rejecting UTEX's request for new rates for collocation); p. 119 (rejecting UTEX's proposed language); p. 122 (rejecting UTEX's proposed language); p. 123 (rejecting UTEX's proposed language); p. 125 (rejecting UTEX's proposed language); p. 130 (rejecting UTEX's OSS terms); p. 136 (rejecting contract

language that would have required AT&T Texas to update its technology); p. 137 (rejecting request for E911 facilities at cost); p. 144 ("The Arbitrators agree that AT&T Texas is under no obligation to provide interconnection or E911 technologies that are not currently part of its network."); p. 150 ("The Arbitrators, therefore, reject UTEX's arguments."); p. 155 ("The Arbitrators conclude that AT&T Texas did not violate its duty to negotiate in good faith during the period preceding the hearing in this docket.").

- Post-Interconnection Agreement Dispute with AT&T Texas in Docket 33323. UTEX lost on all controlling issues. *See* UTEX Ex. 2-3.
- Post Interconnection Agreement Dispute with AT&T Texas in Docket 30459. UTEX lost at the PUC.
- Appeal of PUC decision in Docket 30459. District court affirmed the PUC.
- Appeal of district court decision in appeal of PUC decision in Docket 30459. Fifth Circuit Court of Appeals affirmed the district court. *See* AT&T Ex. 60.
- Petition for Forbearance filed with the FCC. FCC denied relief.
- Appeal of FCC decision. Court denied UTEX's appeal. *Feature Group IP West, LLC v. FCC*, 424 Fed. Appx. 7, 2011 WL 2183864 (D.C. Cir. May 27, 2011).
- Suit by AT&T Texas against UTEX for recovery of LNP query tariff charges, U.S. District Court, Western District of Texas, CA: 1:07-CV-435-LY. District court granted partial summary judgment for AT&T Texas on merits and either denied or dismissed UTEX's claims. AT&T Ex. 47.
- Referral of issues from No. CA: 1:07-CV-435-LY to FCC. FCC held UTEX's tariff as applied to AT&T Texas was invalid. AT&T Ex. 67.

25. UTEX's projections for future revenues are speculative and, for the most part, based on new lines of business in which UTEX has never engaged.

26. UTEX's claims that it can grow a business serving VoIP providers is not credible. Customer Worldcall Internet, an alleged VoIP provider, has only 10-50 customers. The Arbitrator in PUC Docket 33323 (UTEX Ex. 2 at 80) found that the "majority, if not all of the traffic from UTEX to AT&T Texas originated as PSTN traffic, not VoIP." The VoIP providers UTEX is targeting already have competitive local exchange carriers serving them. (2/28 hearing). UTEX's prospects of luring VoIP providers away from existing arrangements with

other carriers is speculative. UTEX has failed to provide any reasonable basis for concluding that UTEX would be successful. UTEX's revenue projections (approx.$100,000 per month) for this business are too speculative to show reasonable assurance of commercial viability. (AT&T Ex. 69, Disc. Stmt, Ex. 6, p. 1.)

27. UTEX's claims about increased revenues from 500 service are not credible. UTEX has never offered 500 service before and knows of no competitive LEC that has done so either. It is also doubtful UTEX will be able to launch this new enterprise in light of the parties' disagreement over the terms of the new agreement. UTEX's revenue projections of approximately $20,000 to $50,000 per month from 500 service are too speculative to show reasonable assurance of commercial viability. (AT&T Ex. 69, Disc. Stmt, Ex. 6, p. 1.)

28. UTEX's claim of increased revenues of $10,000 to $17,500 per month from transit service are not credible. (AT&T Ex. 69, Dsc. Stmt, Ex. 6, p. 1.) The Arbitrators in Docket 26381 indicated it was unlikely UTEX would be able to operate as a transit provider because AT&T Texas could insist on direct interconnection with all carriers. (UTEX Ex. 9 at 72-76.) UTEX's claim (at 2/28 hearing) that it can circumvent this obstacle because AT&T Texas does not offer Internet Protocol (IP) interconnection is not supported by the PUC Award, which says nothing about AT&T Texas having to offer IP interconnection. (UTEX Ex. 9 at 72-76.) UTEX's projected increased revenues from this venture are too speculative to show reasonable assurance of commercial viability.

29. UTEX's projections of revenues of $12,000 to $18,000 per month from a Dark Fiber enterprise are too speculative. (AT&T Ex. 69, Disc. Stmt, Ex. 6, p. 1.) UTEX has never leased Dark Fiber, does not know whether or how much Dark Fiber is available or where it may be located.

30. Even if these speculative revenue projections were valid, UTEX's proposed payments to unsecured creditors would be inadequate. UTEX projects $11,000 to $12,000 per month to pay unsecured creditors, with payments delayed until 5 months after confirmation of UTEX's proposed plan. (AT&T Ex. 69, Ex. C at 3.) Those payments are not adequate to pay all debts in full. Unsecured creditors would be paid only a small fraction of their claims.

31. UTEX's proposed plan of reorganization provides for $0.00 payments to AT&T Texas on both its $9.1 million in pre-petition access charges and on its $269,000 in post-petition access charges. (AT&T Ex. 68, Ex. E, Schedule of amounts of claims for unsecured creditors.)

32. UTEX proposes to pay a small fraction of the $9.1 million in access charges based on the occurrence of an "Alternative Treatment Event" ("ATE"). Under UTEX's ATE, AT&T Texas would be paid $400,000 over a 60 month period on a $9.1 million claim. This amount does not even cover the 6% interest allowed for Class 5 claims under the Plan. The ATE occurs when UTEX exhausts and fails at its appeals of the PUC's decision in Docket 33323 and this Court's judgment that AT&T Texas' access charge claims are valid and owing. (AT&T Ex. 68 at p. 4 of 18 (defining ATE)). It is uncertain when a final judgment in the district court will be entered, and further appeals could delay occurrence of the ATE for years. UTEX's proposal is an unreasonable scheme to continue nonpayment of an established debt.

33. The UTEX estate is administratively insolvent. (Jan. MOR).

CONCLUSIONS OF LAW

1. 11 U.S.C. § 1112(b)(1) states that a case "shall" be converted for cause. This is AT&T Texas' burden. "Shall" is mandatory. The Court, with specific reasons, can refuse to convert a case if it is not in the best interest of the estate and the debtor shows there is a reasonable likelihood that a plan will be confirmed within a reasonable time. 11 U.S.C. § 1112(b)(1).

2. If the "cause" for conversion does not consist of the grounds under § 1112(b)(4)(A) – *i.e.*, loss to the estate and no reasonable likelihood of reorganization – then the debtor has the burden of showing (a) reasonable justification for the act or omission that establishes cause and (b) the act or omission will be cured within a reasonable period of time fixed by the Court.

3. Good cause to convert exists because UTEX's net operating losses, coupled with rising unpaid post-petition net ordinary operating expenses, demonstrate a "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b)(4)(A).

4. Good cause to convert exists because UTEX has breached multiple fiduciary duties to the creditors and to the bankruptcy estate. In particular, good cause to convert exists because UTEX has violated its duties to (1) treat all creditors fairly, (2) maximize the value of

the estate, (3) place the interest of creditors above its own interests and above the interests of its insiders, and (4) refrain from self dealing.

5. Good cause to convert exists because the evidence establishes that UTEX's plan for reorganization cannot be confirmed within a reasonable period of time.

6. Good cause to convert exists because UTEX filed its petition in this bankruptcy as a litigation tactic to avoid compliance with the PUC's decision in Docket 33323. Chapter 11 is not a substitute for a stay pending appeal. This Chapter 11 case is an improper two-party dispute. *See In re Antelope Techs., Inc*., Case No. 07-31159, 2010 Bankr. LEXIS 66, at *8 (Bankr. S.D. Tex. Jan. 7, 2010)

7. Conversion to Chapter 7 rather than dismissal is necessary because of the potential preference actions against both insiders and others, the overpayments to insider Worldcall, the size of the pre-petition debt, the accrual of substantial unpaid administrative expenses, the extensive pending litigation, and the need for a trustee to objectively evaluate whether this litigation should be pursued.

8. UTEX's plan for reorganization depends on overturning adverse decisions on appeal at some indeterminate time in the future. A plan based on "hoped-for success" on appeal "is not feasible." *In re DCNC North Carolina I, LLC*, 407 B.R. 651, 668 (Bankr. E.D. Pa. 2009).

9. UTEX's speculative projections of future profits render the proposed plan for reorganization infeasible. Feasibility requires that a plan to be "'based on concrete evidence of financial progress, and must not be speculative, conjectural or unrealistic.'" *In re Save Our Springs (S.O.S.) Alliance, Inc*., 388 B.R. 202, 240-41 (Bkrtcy. W.D. Tex. 2008) (Gargotta, J.), *aff'd*, 632 F.3d 168 (5th Cir. 2011). UTEX's plan fails to meet this requirement.

10. In order to effectuate a Chapter 11 plan, UTEX must satisfy 11 U.S.C. § 507(a)(1) and "pay the administrative claims, in full, on the effective date" unless otherwise agreed to by the parties. *In re Moore Construction, Inc.*, 206 B.R. 436, 438 (N.D. Tex. 1997). UTEX's plan fails to meet this requirement.

11. UTEX's efforts to continue in Chapter 11 violate the principle that bankruptcy should not be used and the assets of the estate should not be depleted to chase the debtor's "terminal euphoria." *In re Little Creek Dev. Co.*, 779 F.2d 1068, 1073 (5th Cir. 1986).

12. An "effective reorganization" requires "a reasonable possibility of a successful reorganization within a reasonable amount of time." *United Sav. Ass'n. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375-76 (U.S. 1988). UTEX fails this test.

13. For Debtor to establish a mutual mistake, "the evidence must show that both parties were acting under the same misunderstanding of the same material fact." *Winegar v. Martin*, 304 S.W.3d 661, 668 (Tex. App.–Fort Worth 2010, no pet.). UTEX has failed to provide evidence of mutual mistake with respect to the payments under the Worldcall Consulting Agreement.

14. UTEX is presumed insolvent in the 90 days preceding the filing of bankruptcy. 11 U.S.C. § 547. UTEX's schedules establish that it was insolvent during the entire year preceding bankruptcy.

15. Conversion to Chapter 7 is in the best interest of the creditors. The estate is declining in value, UTEX is refusing to prosecute its preference claims, which will be barred on March 6, 2012, and UTEX is refusing to recover the overpayment to WorldCall. At this point in time, the creditors' best hope of any recovery is having the case converted to Chapter 7, where the Trustee may pursue avoidance actions for the benefit of all creditors.

ACCORDINGLY, IT IS THEREFORE ORDERED that Debtor's case is hereby converted to Chapter 7.

# # #

EXHIBIT REMOVED AS CONFIDENTIAL

EXHIBIT 5

AT&T's Proposed Data Roaming Agreement

TAB 3

Before the
Federal Communications Commission
Washington, D.C. 20054

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	)	
	)	
Interoperability of Mobile User	)	
Equipment Across Paired Commercial	)	
Spectrum Blocks in the 700 MHz Band	)	
	)	

DECLARATION OF MICHAEL PRISE

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Before the
Federal Communications Commission
Washington, DC 20054

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	)	
	)	
Interoperability of Mobile User	)	
Equipment Across Paired Commercial	)	
Spectrum Blocks in the 700 MHz Band	)	
	)	

DECLARATION OF MICHAEL PRISE

I. QUALIFICATIONS AND BACKGROUND

1. My name is Michael Prise. My title is Distinguished Member of Technical Staff in the Subscriber Product Engineering group at AT&T Labs. I am responsible for overall coordination of the Device Requirements at AT&T. These are the technical requirements which are delivered to all wireless device and chipset manufacturers. I have worked in this area since 1995, having held similar positions with McCaw Cellular, AT&T Wireless and Cingular Wireless. Between 1985 and 1995 I was a research engineer (1992-1995 a Distinguished Member of Technical Staff) in the Communication Research Division at AT&T Bell Labs, working on modem design of cordless phones. I received my B.Sc. in Physics from University of Aberdeen (1980) and Ph.D. in Physics from Heriot-Watt University (1983), both in Scotland.

II. PURPOSE & SUMMARY

2. The purpose of this declaration is to respond to two incorrect assertions by Worldcall Interconnect, Inc. ("WCX"): (1) that AT&T is the only potential roaming partner for WCX[1] and (2) that AT&T unilaterally introduced Band 17, without authorization.[2]

3. *First*, AT&T is not WCX's only potential roaming partner. As I explain below, today's devices support multiple bands, which means that WCX can obtain roaming from any carrier that supports any of the bands in the devices it chooses to sell to its customers. For example, as shown below, the Google Nexus 7 – a device that WCX purports to offer – supports several LTE bands, including LTE bands 2, 4, and 13. This device is thus capable of roaming on Verizon (Bands 4 and 13), T-Mobile (Bands 2 and 4), C-Spire (Bands 2 and 4), and numerous local and regional wireless services providers.

4. Further, even if, contrary to industry practice, WCX chooses to roam only on other networks that support the 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. As I demonstrate below, WCX's spectrum is also compatible with Band 12, which is supported by T-Mobile, U.S. Cellular, and other providers. Moreover, any plan by WCX to use and roam only on Band 17 is seemingly at odds with the Federal Communications Commission's ("FCC's") policy of encouraging carriers to migrate their customers away from Band 17 to Band 12.[3]

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[1] *See, e.g.*, Roetter Conf. Decl., at 195, lines 3-5; Feldman Suppl. Decl., ¶ 14; Amended Compl., ¶ 22.

[2] Roetter Conf. Decl., at 195, lines 6-7.

[3] *See* Report and Order and Order of Proposed Modification, *Promoting Interoperability in 700 MHz Commercial Spectrum; Requests for Waiver and Extension of Lower 700 MHz Band Interim Construction Benchmark Deadlines*, WT Docket Nos. 12-69, 12-332 (Oct. 29, 2013) ("*Interoperability Order*").

5. *Second*, there is no merit to WCX's assertion that AT&T unilaterally introduced Band 17, without authorization.[4] LTE device standards are developed through a consensus process open to all by the 3rd Generation Partnership Project ("3GPP"). And, as the FCC has explained, Motorola, not AT&T, originally proposed that the 3GPP adopt Band 17 for purely technical reasons arising from legitimate concerns about interference between the 700 MHz A block and other spectrum bands.[5]

III. WCX HAS MANY OPTIONS FOR ROAMING IN ADDITION TO BAND 17

6. WCX holds Lower 700 MHz B block spectrum licenses.[6] WCX states that it intends to deploy that spectrum using Band 17, which comprises the Lower 700 MHz B and C blocks. However, WCX incorrectly asserts that, because of WCX's choice to use Band 17 in its home network, AT&T is the only potential roaming partner for WCX.[7]

7. In fact, WCX has numerous options other than AT&T for roaming. The ability to roam on other LTE networks depends on the LTE bands that are compatible with the *device* used by the customer; it does not depend on the LTE band(s) used in a carrier's home network. Thus, that WCX intends to deploy only Band 17 in its home network does not limit its roaming to other Band 17 networks.

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[4] Roetter Conf. Decl., at 195, lines 6-7.

[5] *Interoperability Order*, ¶¶ 8-9.

[6] Feldman Decl., ¶ 15 ("WCX has only the B-Block lower 700 MHz license, is entirely LTE-based and has no legacy network (1G, 2G or 3G) upon which to rely.").

[7] Roetter Conf. Decl., at 195, lines 3-5 ("AT&T is the ONLY potential provider of roaming services using Band Class 17 LTE technology that WCX's license (700 MHz Lower Band B Block) requires") (emphasis in original); Feldman Suppl. Decl., ¶ 14, subpart d. ("[i]n order for WCX to provide a service that is both competitive and commercially viable, it is essential that the company establish a roaming arrangement with AT&T Mobility."). *See also* Amended Compl., ¶ 22 ("AT&T is the only potential roaming supplier that is currently technically compatible with WCX").

8. WCX's potential roaming partners will be determined by the devices WCX chooses to support for its customers. Today's devices are almost never limited to a single LTE band, and especially not to Band 17. Instead, today's devices are typically compatible with a wide range of LTE bands in the U.S., including, for example, 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).

9. The latest iPhone 6 is a prime example of a device that supports multiple LTE bands and thus multiple roaming partners. 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. If WCX were to offer the iPhone 6 to its customers, it could obtain roaming for those customers from any carrier that supports any of the 16 bands supported by the iPhone, including, Verizon, Sprint, T-Mobile, U.S. Cellular, C-Spire and many other U.S. wireless providers.[8]

10. Like the iPhone 6, the Band 17 LTE devices offered by AT&T support multiple other LTE bands and are thus capable of roaming on a wide variety of other carriers. *See* Exhibit 1 (list of AT&T devices and supported bands). For example, the Galaxy Note 4 (one of the latest smartphones from Samsung) supports bands 2, 4, 12, and 17, and thus supports roaming on T-Mobile, Verizon, U.S. Cellular, and C-Spire.[9] Similarly, the data-only wi-fi devices offered by AT&T support multiple bands. For example, the Unite Pro (a Sierra Wireless mobile hotspot

[8] *See, e.g., infra* ¶¶ 12-14 & Table 1.

[9] *Id.*

device) supports LTE in bands 2, 4, 5, and 17, and thus can roam on T-Mobile, Verizon, C-Spire, and multiple other carriers.[10]

11. According to WCX's website, WCX offers the following LTE-capable devices: (1) the Google Nexus 7; (2) an unidentified Samsung Galaxy Tablet; and (3) the Sierra Wireless AirCard 754S.[11] Each of these devices supports 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. Similarly, 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. Likewise, the Sierra Wireless Aircard 754S, which is a *2011 model*, supports two LTE bands (4 and 17), and thus can roam on multiple carriers.[12]

12. Table 1, below, identifies the LTE bands supported by the four national wireless services providers, as well as the bands supported by regional carriers U.S. Cellular and C-Spire, which confirms the many roaming options available to WCX.

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[10] *Id.*

[11] *See* Evolve Broadband Website (click "Learn More" under "Special Promotions), http://www.evolvebroadband.com/#/home. *See also* Feldman Decl. ¶ 23 ("WCX has tested in its lab and is offering to the public AT&T network compatible end user devices including hotspots, tablets and smartphones.").

[12] The newer models of the Sierra Wireless Aircard that AT&T sells support many additional bands (2, 4, 5, and 17) and thus support even more roaming options.

Table 1. LTE Bands By Providers (Frequencies In MHz)

	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[13]	X	X	X			X			
Verizon		X			X				
T-Mobile	X	X		X					
Sprint							X	X	X
U.S. Cellular			X	X					
C-Spire	X	X							

13. In addition, there are numerous smaller wireless providers throughout the country that support these bands. These providers are successfully working together and with national carriers to create roaming "clearinghouses" that provide a one-stop-shop to obtain LTE roaming arrangements with them. For example, the Competitive Carrier Association ("CCA") has created a "Data Access Hub, which serves as a clearinghouse for participating members to reciprocal roaming agreements with CCA member operators."[14] The Data Access Hub thus "eases roaming implementation across carriers and makes it easier and less costly to expand 4G LTE coverage"[15] because it "provides participating carriers the opportunity to connect immediately to all other participating carriers' networks and substantially expand coverage."[16] There are many CCA data hub members – including many smaller providers and a national provider (Sprint) – and together they support LTE roaming across the country in many different LTE bands. The CCA Data

[13] AT&T has widespread deployment of Band 17 and Band 4 for LTE. AT&T is in the process of re-farming Band 2 and Band 5 spectrum from legacy technologies (*e.g.*, GSM/UMTS/HSPA/HSAP+) to LTE. As a result, AT&T's deployment of Band 2 and Band 5 for LTE is currently limited to discrete areas.

[14] Phil Goldstein, *Sprint adds 15 rural carriers to LTE roaming program*, FierceWireless (Sept. 5, 2014), *available at* http://www.fiercewireless.com/story/sprint-adds-15-rural-carriers-lte-roaming-program/2014-09-05 ("*Goldstein Article*").

[15] *Id.*

[16] Press Release, *CCA Annual Convention Kicks Off with Focus on LTE*, (Sept. 10 2014), *available at* http://cca-convention.org/category/newsroom/.

Access Hub thus provides yet another way for WCX to obtain widespread roaming, without relying on AT&T.

14. Sprint's approach to the CCA Data Access Hub also further confirms that carriers can choose their roaming partners by choosing the devices deployed in their network. Many CCA members use (or plan to use) Band 12 for LTE in their home networks, but Sprint does not. Nonetheless, Sprint has announced that, to ensure greater access for its customers to roaming through the CCA Data Access Hub, it will begin including LTE Band 12 in its devices.[17] This example vividly illustrates that carriers ultimately have control over their LTE roaming options through the choice of devices they sell to their customers.

15. Further, even if (contrary to fact) WCX could roam only on other networks that support WCX's lower 700 MHz B block spectrum, AT&T is not the only option. There are *two* bands that support lower 700 MHz B block spectrum: Band 17 (which supports lower 700 MHz B and C blocks) and Band 12 (which supports lower 700 MHz A, B, and C blocks). Thus, WCX's spectrum is compatible with either Band 17 or Band 12. WCX, which is just now deploying its network, could just as easily deploy a Band 12 network.

16. There are many options for Band 12 roaming. Most notably, T-Mobile owns large amounts of Lower 700 MHz A block spectrum covering more than 150 million POPs, which it is now deploying using Band 12.[18] T-Mobile's Chief Technology Officer has stated that T-Mobile "will be selling a half-dozen 700 MHz (Band 12) capable phones by the end of the

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[17] *Goldstein Article.*

[18] T-Mobile, *US Q2 2014 Earnings*, Slide Presentation, at 8 *available at* http://investor.t-mobile.com/Cache/1001189365.PDF?Y=&O=PDF&D=&fid=1001189365&T=&iid=4091145.

year."[19] U.S. Cellular has also deployed LTE in Band 12, and local carriers have either already deployed Band 12 or must do so in the near future as a condition of their licenses.[20] In fact, as noted above, due to the potential ubiquity of Band 12 roaming alternatives, Sprint is now planning to use Band 12 in the devices its sells so that it can roam on these carriers, even though Sprint does not use Band 12 in its home network.[21]

17. It is also notable that WCX's purported decision to deploy its Lower 700 MHz B block spectrum using Band 17, rather than using Band 12, appears to be at odds with the FCC's recent *Interoperability Order*. In that Order, the FCC modified AT&T's Lower 700 MHz licenses to facilitate AT&T's transition from Band 17 to Band 12 over the next few years. As explained by the FCC: "[b]y ensuring that AT&T, the largest license holder of spectrum in the B and C Blocks, transitions to interoperability, we conclude that the steps we take today will be enough to ensure that the public interest benefits of interoperability are realized while avoiding unnecessary regulatory burdens."[22]

18. Finally, WCX's reliance on declarations submitted by T-Mobile in support of T-Mobile's Petition for Expedited Declaratory Ruling, particularly the portions of the Declaration of Dirk Mosa discussing the use of multimode handsets to resolve interoperability issues, is

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[19] Sascha Segan, *T-Mobile Doubles Down on Wi-Fi Calling; In an exclusive interview, T-Mobile's CTO says high-quality calling is coming soon*, PC Magazine (Sept. 10, 2014), *available at* http://www.pcmag.com/article2/0,2817,2468252,00.asp.

[20] *See, e..g, Interoperability Order*, ¶¶ 60-66.

[21] *Goldstein Article*, (Sprint "will make devices more compatible with regional carriers' networks by adding support for additional spectrum bands, including the AWS and lower 700 MHz spectrum [Band 12]," which are "used by Competitive Carriers Association member carriers.").

[22] *Interoperability Order*, ¶ 49. In this regard, AT&T currently plans to support Band 12 by the end of 2015, and to then eliminate Band 17 devices from its device portfolio within two years after that date (*i.e.*, by approximately the end of 2017). Consequently, to the extent WCX intends to rely on Band 17 devices offered by AT&T, that is not a viable long-term plan.

misplaced.[23] As is clear from Mr. Mosa' Declaration, T-Mobile's major concern in that regard related to its need to retain compatibility with legacy 2G and 3G networks and costs associated with converting its entire base of customer handsets to multimode handsets.[24] Those concerns have no application to WCX, which is only seeking roaming on AT&T's LTE network, will not require legacy 2G or 3G networks for voice or text messages, and does not have an existing base of 2G and 3G customers.[25]

IV. THE INDUSTRY STANDARDS SETTING BODY CALLED 3GPP ADOPTED BAND 17 BASED ON CONCERNS RAISED BY MOTOROLA.

19. WCX's declarant, Dr. Martyn Roetter, incorrectly asserts that "Band Class 17 was introduced unilaterally without authorization at the instigation of AT&T."[26] In fact, LTE device standards are developed by the 3rd Generation Partnership Project ("3GPP"), and Motorola originally proposed that the 3GPP adopt Band 17 for purely technical reasons arising from possible interference between the A block and other spectrum bands.[27] As explained by the FCC:

> Industry standards for LTE are developed by 3GPP, an international partnership of industry-based telecommunications standards bodies that, among other things, establishes standards for different LTE band classes. . . . After the conclusion in March

[23] *See, e.g.*, Feldman Decl., ¶ 14, Ex. 2.

[24] *Id.* at Ex. 2 at 87 (¶¶ 14 and 15 of Mosa's Declaration).

[25] *See, e.g.*, Amended Compl., ¶ 5 ("To AT&T it will look like regular non-interconnected broadband data."); Feldman Decl., ¶ 15 ("WCX has only the B-Block lower 700 MHz license, is entirely LTE-based and has no legacy network (1G, 2G or 3G) upon which to rely.").

[26] Roetter Conf. Decl., p. 195, lines 6-7.

[27] As Motorola explained when it proposed Band Class 17: "The rationale for this new band is to address possible co-existence issues with High power TV broadcast transmission in Channel 51 and other broadcast transmission in channel 55 (block D) and channel 56 (block E)." Motorola, *TS36.101: Lower 700 MHz Band 15, R4-081108, 3GPP TSG RAN WG4 (Radio) Meeting # 47*, Kansas City, April 5-9, 2008, *available at* http://www.3gpp.org/ftp/tsg_ran/WG4_Radio/TSGR4_47/Docs/R4-081108.zip.

> 2008 of Auction 73, *Motorola initiated steps* to have 3GPP establish a new industry standard (later designated as Band Class 17) that would be limited to the Lower 700 MHz B and C Blocks. In proposing Band Class 17, Motorola cited the need to address concerns about high power broadcast transmissions in Channel 51 and the Lower 700 MHz D and E Blocks.[28]

[28] *Interoperability Order*, ¶¶ 8-9 (emphasis added).

VERIFICATION PAGE

I hereby swear under penalty of perjury that the foregoing is true and correct.

/s/ Michael B. Prise
Michael Prise

Dated: November 3rd, 2014

EXHIBIT 1

(LTE Bands Supported By Devices Offered By AT&T)

EXHIBIT 1. LTE Bands Supported by Devices Offered By AT&T

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

Source: AT&T's Website, http://www.att.com/shop/wireless/devices.html#fbid=lNA7kGdhiZw.

EXHIBIT 2

(Material From Internet Websites Cited In Declaration)

EXHIBIT 2.A

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Under this promotion, Evolve Broadband will provide a bundled voice and data service offering at a substantial discount. Call us for more details and pricing.

If you are eligible for the Federal Universal Service Program Lifeline program, you may also be eligible for an additional discount.

Please call us for details and reference "Promotion." If you do not live in one of these areas, you are not eligible for this promotion. Check back with us for additional promotions in other areas.

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Sprint adds 15 rural carriers to LTE roaming program

September 5, 2014 | By Phil Goldstein

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Sprint (NYSE: S) added 15 new rural wireless carrier partners to its LTE roaming program, growing the size of its LTE roaming footprint by more than 4 million POPs.

The new partners build on Sprint's announcement in June of 12 rural LTE roaming partners, which included a previously announced deal with nTelos Wireless. Those agreements covered 34 million POPs in 23 states. Including the new agreements, the program now includes 27 carriers, and extends coverage over 565,000 square miles in 27 states and a population of more than 38 million people.

Sprint is using its Rural Roaming Preferred Provider program to expand its LTE

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footprint, which lags those of Verizon Wireless (NYSE: VZ) and AT&T Mobility (NYSE: T). Verizon says it covers 306 million POPs with LTE and AT&T just reported that its network covers 300 million POPs. Sprint's LTE footprint currently covers 254 million POPs, but because it does not have as much low-band spectrum as Verizon and AT&T its LTE network reach has been limited. All of the agreements under Sprint's program include reciprocal roaming agreements, letting Sprint customers roam onto the rural carriers' networks and vice versa.

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For the smaller carriers, the program offers access to a larger LTE network footprint at a low cost, Sprint's LTE device portfolio and in some cases the ability to lease Sprint's spectrum. Sprint is also working with its rural partners to get them access to network infrastructure for the 2.5 GHz band, a key element of Sprint's tri-band LTE Spark service.

Notably, Sprint said that beginning in 2015, it will make devices more compatible with regional carriers' networks by adding support for additional spectrum bands, including the AWS and lower 700 MHz spectrum (presumably Band 12) that are used by Competitive Carriers Association member carriers. Sprint will also support device changes that allow regional carriers to provision, manage and brand devices independently through CCA's Device Hub.

Sprint's new roaming partners include:

- Bluegrass Cellular, serving Kentucky
- Blue Wireless, serving New York and Pennsylvania
- Pine Belt Wireless, serving Alabama
- Pioneer Cellular, serving Oklahoma and Kansas
- Public Service Wireless, serving Alabama and Georgia
- Syringa Wireless, serving Idaho
- Rural Independent Network Alliance (RINA) members and their partners:
    - Strata Networks, serving Utah, Wyoming and Colorado
    - Silver Star Wireless, serving Wyoming and Idaho
    - All West Wireless Inc., serving Wyoming and Utah

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- CTC Telecom Inc., serving Idaho
- South Central Communications Inc., serving Utah
- Custer Telephone Wireless, serving Idaho
- Breakaway Wireless, serving Utah

Sprint had previously announced deals with nTelos, SouthernLINC Wireless, C Spire Wireless, Nex-Tech Wireless, Flat Wireless, SI Wireless, which does business as MobileNation, Inland Cellular, Illinois Valley Cellular, Carolina West Wireless, James Valley Telecommunications, Phoenix Wireless and VTel Wireless.

Interestingly, six rural carriers are now supporting both Verizon's more established LTE in Rural America initiative and Sprint's LTE roaming program. They are Bluegrass Cellular; Pioneer Cellular; Strata Networks; Carolina West; Custer Telephone Cooperative and Phoenix Wireless.

Sprint is collaborating with CCA on the group's Data Access Hub, which serves as a clearinghouse for participating members to reciprocal roaming agreements with CCA member operators. The CCA Data Access Hub expands collaboration opportunities among carriers, eases roaming implementation across carriers and makes it easier and less costly to expand 4G LTE coverage.

Sprint is also continuing its work with the NetAmerica Alliance on its Smart Market Alliance for Rural Transformation program. Under that initiative, Sprint is giving NetAmerica members the ability to access its network and to build new networks in partnership with Sprint. Sprint said is licensing its unused 800 MHz and 1900 MHz spectrum to NetAmerica members that wish to build LTE networks on the spectrum. Smaller carriers that agree to build LTE networks through the program can also make use of Sprint's core and its Network Vision architecture.

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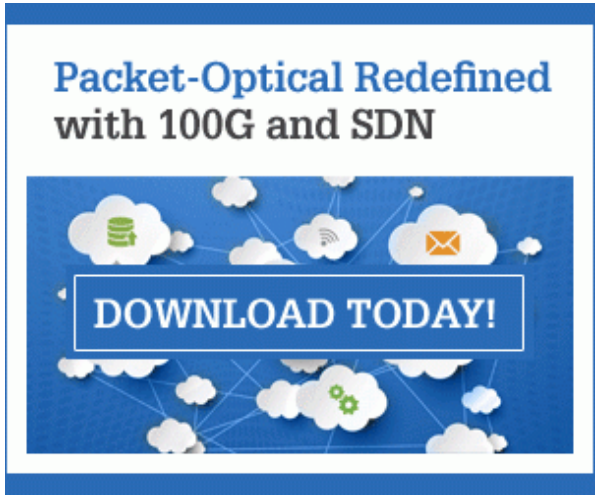

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COMMENTS

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DirkDigg1er • 2 months ago
Good work! Sprint is finally leveraging it's network partners and Brightstar's distribution with great roaming rates while expanding it's Spark LTE footprint. 292m pops puts them within striking distance of AT&T.
13 • Reply • Share ›

maximus1901 → DirkDigg1er • 2 months ago
Until we know that there's some clause to hinder sale to vzw, that coverage could go poof one day.
Vzw has every reason to prevent sprint from reaching coverage parity.
And if sprint was willing to spend $40bil on TMO why not just buy out CCA?
6 • Reply • Share ›

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DirkDigg1er → maximus1901 • a month ago

One reason is that Verizon's network wouldn't support lte bands 12, 25, 26, & 41. Also, Verizon may focus on the upcoming spectrum auctions and refarming spectrum instead. As for Sprint, tmo purchase was for different purposes. Sprint is looking to save estimated $1.9b on network cost and make a small profit on the back end from the roaming agreement. This seems like measures to cut cost and focus on improving quality abroad. Sprint could eventually purchase networks down the road but it's not in the short term trajectory.

3 • Reply • Share ›

maximus1901 → DirkDigg1er • a month ago

Verizon has nationwide band 13. It doesn't need band 12. And what does support for b41 have to do with the issue I raised?

1 • Reply • Share ›

DirkDigg1er → maximus1901 • a month ago

You just answered your own question. Verizon doesn't need the smaller carriers that support those bands. If you looking for a guarantee, don't hold your breath. Verizon COULD end up purchasing the remaining LTEiRA partners.

2 • Reply • Share ›

Guest → maximus1901 • a month ago

FCC won't allow that in rural areas

• Reply • Share ›

maximus1901 → Guest • a month ago

Why not?

• Reply • Share ›

Guest → maximus1901 • a month ago

because of "competition" in rural areas

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S. Ali → DirkDigg1er • 2 months ago

If Sprints build-out is any indication of how long takes to integrate these new bands, we won't see this roaming come to fruition until 2018 or beyond.There is almost no demand in these rural regions and its mostly low APRU customers. Sprint wants these small carriers to carry all the burden (financial) of expanding their footprint but these carriers get peanuts in return because they can't expand beyond their territory without upsetting partners (sales restrictions). Sprint is marginalizing these carriers with hopes that they shutdown or go bankrupt so they can sweep in and pick them up at a discount (since they already use their bands). Not to mention, this type of arrangement is ripe for collusion (see how Verizon has forced partners to adopt mobile share plans). Pretty shady and unethical if you ask me. I think the FCC/FTC should look into the terms of these deals.

6 • Reply • Share ›

DirkDigg1er → S. Ali • 2 months ago

Sometimes you have to think of it as the cup is half full. Sprint is not hoping small carriers shutdown. They shutdown generally because inferior network, high prices, and limited device selection. The agreements are beneficial to both sides. Sprint gets coverage and small carriers get discounted resources. The difference between Verizon's agreement is the option to use their own spectrum. Now small carriers can finally launch LTE bands 4 / 12 / 25 / 26 / 41 and expand its nationwide footprint.

*I also agree that Verizon's deal only benefits itself.

9 • Reply • Share ›

TB → DirkDigg1er • 2 months ago

Don't waste your time replying to him. He's a troll.

12 • Reply • Share ›

maximus1901 • 2 months ago

What's to prevent vzw from buying up all this carriers? Nothing.
It'd be hilarious if vzw did just that.
"Announcing sprint's new roaming pops: 0" lol

5 • Reply • Share ›

Guest → maximus1901 • 2 months ago

Why so negative. At least it is getting done. We will have a 3rd carrier that will have near the same coverage on LTE compared to duopoly. This brings competition.

12 • Reply • Share ›

maximus1901 → Guest • 2 months ago

Point is nothing to stop vzw ffrom buying out all rural roaming partners.

3 • Reply • Share ›

Hector Arteaga → maximus1901 • 2 months ago

That is a real possibility, but it is definitely less attractive with the new options these rural carriers have. The ability to get devices has always been a disability, but now that has changed.

6 • Reply • Share ›

lsutigers → maximus1901 • a month ago

This is the hypothetical scenario, albeit unlikely.

First of all, a Verizon buyout of rural roaming partners would receive serious scrutiny by the FCC, if they even consider it. Verizon is much too large to control all rural LTE coverage on top of that. By the small chance that Verizon is even interested in buying them out and it is allowed by the FCC, it would likely come with significant network sharing/roaming stipulations and concessions. Meaning the FCC would likely force Verizon to allow all carriers to roam on their LTE network. Which in turn would mean Sprint and other tier 1 carriers really have nothing to lose as they would likely be able to roam on Verizon LTE if that happened.

• Reply • Share ›

maximus1901 → lsutigers • a month ago

It's ok for sprint to take out a competitor covering 280mil with lte

by mid 2015 but whoah! taking out a few carriers covering 34 mil is out of question? Gimme a break.

And verizon would be glad to do lte roaming.... On band 13 hahahaha Do you think sprint wants to add verizon-only lte band just to roam?!?!?!

1 • Reply • Share ›

lsutigers → Guest • a month ago

Agreed, and Sprint isn't even done deploying its own LTE network on all 3 bands. With this LTE roaming agreement and Sprints fully deployed LTE spectrum resources, it could easily match or surpass AT&T and Verizon in terms or coverage POPs. Now they just need to hurry up and finish their own deployment.

2 • Reply • Share ›

maximus1901 → lsutigers • a month ago

And those facts are exactly why verizon will probably buy out the rural carriers

1 • Reply • Share ›

Miguel A. Paz-Vergara → maximus1901 • 2 months ago

Most competent business leaders will choose to keep making money for the foreseeable future rather than take a one time lump sum payment. If they can be competitive then they will stay in business.

7 • Reply • Share ›

maximus1901 → Miguel A. Paz-Vergara • 2 months ago

Depends what the mutiple of earnings the offer is.

3 • Reply • Share ›

DirkDigg1er → maximus1901 • 2 months ago

Did you read this article? Selling to Verizon/AT&T was mainly due to lack of options. With Sprint's new program it gives smaller carriers lower roaming rates, access to Tri band spectrum, network vendors, and lower device distribution rates (via Brightstar)

distribution rates (via Brightstar).

9 • Reply • Share ›

maximus1901 → DirkDigg1er • 2 months ago

What about the option of selling and making lots of cash?

4 • Reply • Share ›

Hector Arteaga → maximus1901 • 2 months ago

There is still that option, but now makes it less attractive.

7 • Reply • Share ›

Glenn Gore • 2 months ago

Is there any information as to whether or not there are any data restrictions or limits under this program when on a roaming partner's system? Or is it fully same-as-native as Verizon's LTE in Rural America program is with no data caps or restrictions nationwide beyond what a user already has under the plan they have with their personal carrier?

• Reply • Share ›

Bryce → Glenn Gore • 2 months ago

It is supposed to be treated as 100% native much like Verizon's LTEiRA program.

3 • Reply • Share ›

Glenn Gore → Bryce • a month ago

Good, it should be. I am hoping against hope that this is the beginning of universal roaming in some form or another since T-Mobile has announced they are looking into working with the CCA folks too.

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EXHIBIT 2.C

CCA ANNUAL CONVENTION

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CCA Annual Convention Kicks Off with Focus on LTE

September 10, 2014

CCA Annual Convention, Las Vegas, September 10, 2014 – Competitive Carriers Association's Annual Convention kicked off with a focus on LTE and the opportunities for competitive carriers. With Sprint's announcement last week that it had signed fifteen new LTE roaming partners from among CCA's membership, LTE remained a hot topic throughout the conference. The CCA Data Hub program gives smaller carriers a clear pathway to achieving high-speed mobile broadband solutions by providing carriers low-cost access to Sprint's nationwide 4G LTE network and a wide range of mobile devices.

"Competitive carriers need LTE and roaming capabilities to survive in a fast-moving marketplace," said Steven K. Berry, CCA's president and CEO. "With Sprint's commitment to our membership, our Data Access Hub, and the CCA Device Hub, we're thrilled to see such momentum on the topic being discussed and demonstrated at this year's Convention."

On September 8, CCA's pre-conference day kicked off with the FierceWireless Executive Breakfast, featuring editor Phil Goldstein leading executives from Cellcom, Qualcomm, Sprint, T-Mobile and TNS in an interactive discussion on LTE roaming. The session, entitled "LTE Roaming: With Who, and How Much?" focused on smart strategies for competitive carriers as they pursue roaming agreements with

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CCA Convention & Super Mobility Week

Much" focused on smart strategies for competitive carriers as they pursue roaming agreements with regional and national partners.

Pre-conference sessions were followed by a fireside chat with FCC Chairman Tom Wheeler, who kicked off Super Mobility Week at CCA in a discussion with CCA's Steve Berry. They touched on a number of key issues, stressing that carriers should participate in the upcoming spectrum auctions. They also discussed roaming, device availability, universal service funding and policies to sustain a competitive wireless marketplace.

The opening general session, kicking off the first full day of the CCA Convention, featured keynote addresses that continued to expand on the LTE theme, with remarks from executives at Alcatel-Lucent, Huawei, Ericsson and Syniverse all highlighting the strategic importance of LTE build-outs for competitive carriers and the opportunities for the industry. Key themes included strategies for monetizing data roaming, the power of wireless data services to boost economic development in under-served markets, and the need for continued infrastructure investment.

About the CCA Data Access Hub
Developed by CCA carrier members, the CCA Data Access Hub, powered by TNS, provides participating carriers the opportunity to connect immediately to all other participating carriers' networks and substantially expand coverage.

About the CCA Device Hub
Powered by Apkudo and Interop Technologies, the Device Hub enables CDMA, GSM, and LTE carriers to more efficiently and economically manage their device portfolio through the entire lifecycle by providing a platform to interact, collaborate and share information.

About CCA
CCA is the nation's leading association for competitive wireless providers and stakeholders across the United States. The licensed service area of CCA's more than 100 members covers 95 percent of the nation. CCA's 2015 Global Expo takes place in Atlanta, March 25-27. Visit www.competitivecarriers.org

NEWSROOM *Comments Off*

CCA Annual Convention to Highlight Future of Innovation For Competitive Carriers

August 27, 2014

FCC's Tom Wheeler Opens Super Mobility Week September 8

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Washington, D.C., August 26, 2014 – CCA's Annual Convention will focus on competitive policy issues and the future of innovation with more North American competitive carriers than any other industry event. FCC Chairman Tom Wheeler will open Super Mobility Week at CCA on Monday, September 8 at 3:30 pm PT with a keynote address on trends and policies before the FCC that may impact competitive carriers and the wireless industry as a whole.

The CCA conference will feature sessions on LTE, spectrum auctions, regulatory landscape, marketing techniques, and an exhibit floor focusing on the latest innovations in the marketplace. CCA takes place September 7-10 at The Cosmopolitan of Las Vegas.

"CCA is the gathering point for the competitive carrier ecosystem, which is what makes our event so unique. Industry experts and innovators will be on hand to demonstrate the latest technology and discuss issues that are driving industry competition," said Steven K. Berry, president and CEO of CCA. "If you have an interest in competitive policy issues or a stake in the wireless industry, CCA's Annual Convention is not to be missed."

On Tuesday, September 9, CCA opens with four keynote addresses beginning at 8:15 am PT featuring:

- John Dow, VP, Wireless Business Development, Americas, Alcatel-Lucent
- Mary Clark, CMO, Syniverse
- Charles Ding, Corporate SVP, Huawei Technologies USA
- Gowton Achaibar, COO, Head of Operations, Ericsson North America

On Wednesday, September 10 at 8:30 am PT, FCC Commissioner Mignon Clyburn will speak on regulatory issues followed by a panel of policy experts including:

- Brendan Carr, Legal Advisor, Wireless, Public Safety and International, Office of Commissioner Ajit Pai, FCC
- David Goldman, Senior Legal Advisor, Office of Commissioner Jessica Rosenworcel, FCC
- Renee Gregory, Legal Advisor, Engineering and Technology, Wireless, and Incentive Auction, Office of Chairman Wheeler, FCC
- Erin McGrath, Legal Advisor, Wireless, Public Safety and International, Office of Commissioner O'Rielly, FCC
- Louis Peraertz, Legal Advisor – Wireless, International, and Public Safety, Office of Commissioner Clyburn, FCC

- David J. Redl, Chief Counsel, Communications and Technology, House Committee on Energy and Commerce

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- Paul Kirby, Senior Editor, TR Daily – moderator

A competitive carrier Keynote Roundtable will begin at 10:00 am PT featuring:

- Terry Addington, CEO, SI Wireless d/b/a MobileNation
- Rodney Dir, President & CEO, nTelos Wireless
- Jay Ellison, EVP, Sales & Customer Service, U.S. Cellular
- Hu Meena, president & CEO, C Spire
- Kevin Fitchard, senior writer, GigaOM, moderator

Note to editors: CCA press registration is open. Email cdelgreco@msipr.com or lbram@msipr.com to register.

About CCA Events
CCA events bring the decision-makers in the competitive mobile ecosystem together for networking, learning and sharing best practices. CCA's 2015 Global Expo takes place in Atlanta, March 25-27.

About CCA
CCA is the nation's leading association for competitive wireless providers and stakeholders across the United States. The licensed service area of CCA's more than 100 members covers 95 percent of the nation. Visit www.competitivecarriers.org

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NEWSROOM *Comments Off*

FierceWireless Executive Breakfast Opens CCA Convention & Super Mobility Week

August 22, 2014

Popular Breakfast Series Returns to CCA to Focus on LTE Roaming – With Whom & How Much

Washington, D.C., July 22 2014 – The *FierceWireless* Executive Breakfast series returns to CCA's Annual Convention and will open Super Mobility Week with a panel, *LTE Roaming – With Whom & How Much*, featuring industry thought leaders who will examine the best ways for carriers to gain

How Much, featuring industry thought leaders whowill examine the best ways for carriers to gain access to nationwide LTE coverage. CCA's Annual Convention takes place September 7-10, 2014 at The Cosmopolitan of Las Vegas.

The *FierceWireless* Executive Breakfast takes place on Monday, September 8 at 7:45 am at The Cosmopolitan of Las Vegas. Panelists will discuss the challenges and needs to achieve LTE coverage and whether roaming agreements are the best options for competitive carriers. They will also focus on expanding LTE coverage in rural areas, many of which still lack coverage.

Panelists include:

- Bryan Burns, head of Mobility Products, Transaction Network Services
- Rob Riordan, EVP and director of Corporate Development, Cellcom
- Todd Rowley, VP of Business Development, Sprint
- Sandip Sarkar, senior director of Technology, Qualcomm Technologies
- Heather Stacey, director, Business Development, T-Mobile
- Phil Goldstein, editor, *FierceWireless* – moderator

"We are delighted that *FierceWireless* is once again returning to CCA with their informative and popular breakfast series," said Steven K. Berry, president and CEO of CCA. "Our members absolutely must get to LTE to compete and better serve their customers. I look forward to hearing from the panelists as they examine the best ways to gain access to nationwide LTE coverage as well as what issues competitive carriers need to work through to achieve coverage."

"The national carriers have all largely completed their LTE buildouts, but many rural areas still lack LTE coverage," said Phil Goldstein, editor of *FierceWireless*. "LTE roaming is both a major opportunity and challenge for competitive carriers as they seek to gain access to large LTE footprints for their subscribers. I'm excited to discuss with our panelists the network, partnership and device issues that competitive carriers face in making LTE roaming a reality for their customers."

The FierceWireless Executive Breakfast is sponsored by Sprint. Additional registration fee of $50 is required and includes breakfast and refreshments.

Note to editors: CCA press registration is open. Email cdelgreco@msipr.com or lbram@msipr.com to register.

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Twitter: @CCAssociationDC; #CCAConvention

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About Fierce Markets
FierceMarkets, a division of Questex Media Group, LLC, is a leader in B2B e-media, providing information and marketing services in the telecommunications, life sciences, healthcare, IT, energy, government, finance, and retail industries through its portfolio of email newsletters, websites, webinars and live events. Every business day, FierceMarkets' wide array of digital publications reaches more than 1.5 million executives in more than 100 countries.

NEWSROOM *Comments Off*

CCA Pre-Conference Seminars Highlight Innovation and Revenue Opportunities for Competitive Carriers

August 20, 2014

Washington, D.C., August 20, 2014 – CCA's 2014 Annual Convention, kicking off Super Mobility Week, will host an extensive pre-conference day of seminars focusing on smart strategies for competitive carriers. CCA takes place September 7-10 at The Cosmopolitan of Las Vegas.

The pre-conference seminars will take place on Monday, September 8 and run from 7:45 am – 2:30 pm. Sessions include:

- FierceWireless Executive Breakfast – LTE Roaming: With Whom? And How Much? The session will be moderated by FierceWireless' Phil Goldstein and features: Bryan Burns, Head of Mobility Products, Transaction Network Services; Rob Riordan, EVP and Director of Corporate Development, Cellcom; Todd Rowley, VP of Business Development, Sprint; Sandip Sarkar, Senior Director of Technology, Qualcomm Technologies; Heather Stacey, Director, Business Development, T-Mobile;
- Enterprise Mobility: Why has it failed and what can we do?; Presented by Cormac Foster of GigaOM Research; and
- Andrew Seybold Wireless University: LTE for CCA Members – A not-so-technical tutorial

Additional sessions, focusing on hot topics such as M2M, LTE architectures, customer service and retail, will take place throughout the day. Session sponsors include: Brightstar; Alcatel-Lucent; ExteNet Systems; Intrado; T-Mobile; NetScout; Eupen Cable; Another 9; and iQMetrix.

Following the pre-conference sessions and the CCA Annual Meeting, FCC Chairman Tom Wheeler will kick off the policy agenda at Super Mobility Week with a keynote address, taking place at 3:30 pm. CCA attendees will hear Chairman Wheeler's unique perspective on the trends and policies before the FCC that may impact competitive carriers and the wireless industry as a whole.

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# # #

NEWSROOM *Comments Off*

Newsroom

May 13, 2014

For the Press:
To register for CCA events please contact Cheryl Delgreco at <a href="mailto:cdelgreco@msipr.com". You must be a working journalist or industry analyst to qualify for media credentials. Contributed bylined articles or blog posts by sales, technical, etc. staff do not qualify.

FCC Chairman Tom Wheeler Kicks Off CCA's

FCC Chairman Tom Wheeler Kicks Off CCA's Annual Convention at Super Mobility Week September 8 in Las Vegas

May 13, 2014

>

NEWSROOM *Comments Off*

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EXHIBIT 2.D

T-Mobile US Q2 2014 Earnings

Disclaimer

This presentation contains “forward-looking” statements within the meaning of the U.S. federal securities laws. For those statements, we claim the protection of the safe harbor for forward-looking statements contained in the Private Securities Litigation Reform Act of 1995. Any statements made herein that are not statements of historical fact, including statements about T-Mobile US, Inc.'s plans, outlook, beliefs, opinions, projections, guidance, strategy, integration of MetroPCS, expected network modernization and other advancements, are forward-looking statements. Generally, forward-looking statements may be identified by words such as "anticipate," "expect," "suggests," "plan," “project,” "believe," "intend," "estimates," "targets," "views," "may," "will," "forecast," and other similar expressions. The forward-looking statements speak only as of the date made, are based on current assumptions and expectations, and involve a number of risks and uncertainties. Important factors that could affect future results and cause those results to differ materially from those expressed in the forward-looking statements include, among others, the following: our ability to compete in the highly competitive U.S. wireless telecommunications industry; adverse conditions in the U.S. and international economies and markets; significant capital commitments and the capital expenditures required to effect our business plan; our ability to adapt to future changes in technology, enhance existing offerings, and introduce new offerings to address customers' changing demands; changes in legal and regulatory requirements, including any change or increase in restrictions on our ability to operate our network; our ability to successfully maintain and improve our network, and the possibility of incurring additional costs in doing so; major equipment failures; severe weather conditions or other force majeure events; and other risks described in our filings with the Securities and Exchange Commission, including those described in our Annual Report on Form 10-K filed with the Securities and Exchange Commission on February 25, 2014. You should not place undue reliance on these forward-looking statements. We do not undertake to update forward-looking statements, whether as a result of new information, future events or otherwise, except as required by law.

As required by SEC rules, we have provided a reconciliation of the non-GAAP financial measures included in this presentation to the most directly comparable GAAP measures in materials on our website at http://investor.t-mobile.com.

Agenda

Operating Highlights and Key Initiatives	John Legere, *President and CEO*
Financial Results	Braxton Carter, *CFO*
Q&A	*TMUS Management Team*

Operating Highlights and Key Initiatives

John Legere
President and CEO

Key Messages

1. Fastest Growing Wireless Company in America
   - Industry-leading total and service revenue growth
   - Industry-leading branded postpaid phone and branded prepaid net adds

2. With the Fastest Nationwide 4G LTE Network
   - Cover 233 million Americans in 325 metro areas
   - Aggressively rolling out Wideband LTE and already starting 700 MHz A-Block rollout

3. And the Best Customer Service Nationwide
   - T-Mobile and MetroPCS ranked highest in J.D. Power Wireless Customer Care
   - T-Mobile: first time since February 2011 – MetroPCS: fourth time in a row

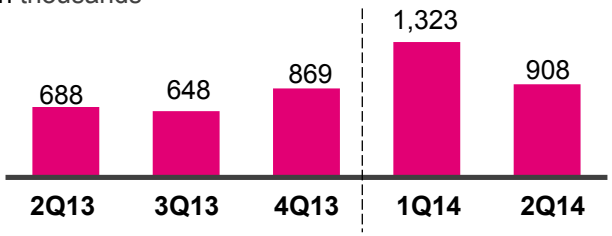
4. We expect our positive momentum to continue into the second half of 2014
   - Increased guidance range for branded postpaid net adds to 3.0 – 3.5 million
   - No change to Adjusted EBITDA guidance – projecting strong YoY growth in 2014

Note: All figures for 2Q13 are pro forma combined results.

Led the Industry in Postpaid Phone Net Adds

Branded Postpaid Nets

in thousands



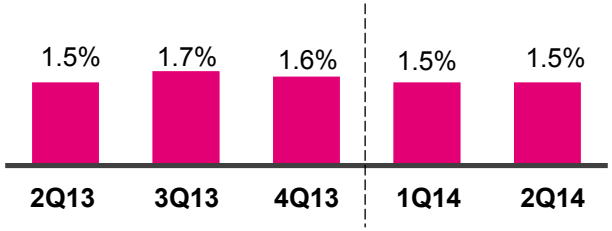
YoY change

Over 900K Branded Postpaid Net Adds

- Incl. 579K phone net adds and record 329K mobile broadband net adds (mostly tablets)
- Impressive branded postpaid growth in seasonally slow quarter

Branded Postpaid Phone Churn

in %

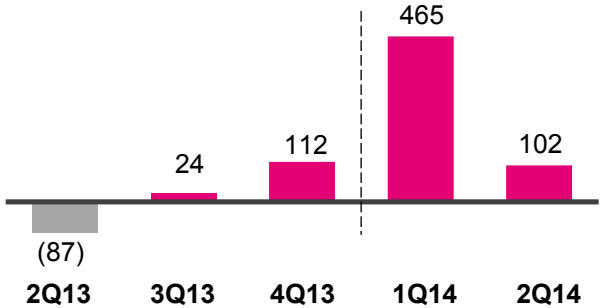


Churn Results Continued at Record Lows

- Branded postpaid phone churn at 1.5%, flat QoQ and YoY

Branded Prepaid Nets

in thousands



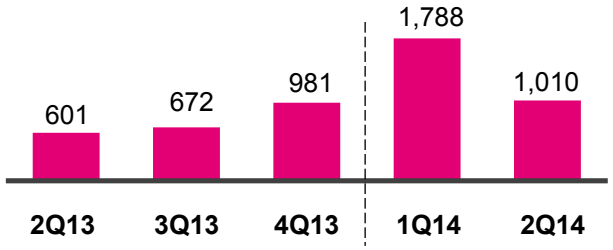
Industry-Best Branded Prepaid Performance

- 102K branded prepaid net adds in seasonally slower second quarter – significant improvement from (87K) in 2Q 2013
- Ongoing prepaid to postpaid migrations of ~85K

Note: All figures for 2Q13 are pro forma combined results.

Strong Customer Momentum Across the Board

Total Branded Nets
in thousands

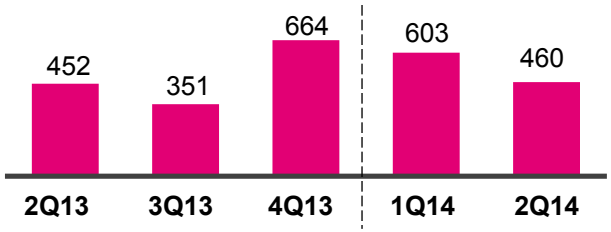


YoY change

Over 1 Million Total Branded Net Adds

- Un-carrier strategy driving continued success in branded postpaid and prepaid
- Q1 2014 significantly benefited from Un-Carrier 4.0 (ETF) and seasonality of prepaid growth

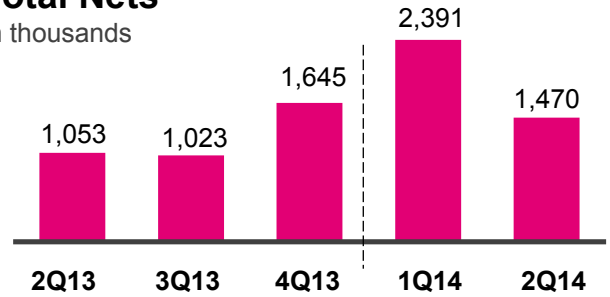
Wholesale Nets
in thousands



Solid Performance in Wholesale

- 225K M2M net adds, up 69% YoY
- 235K MVNO net adds, down 26% YoY

Total Nets
in thousands



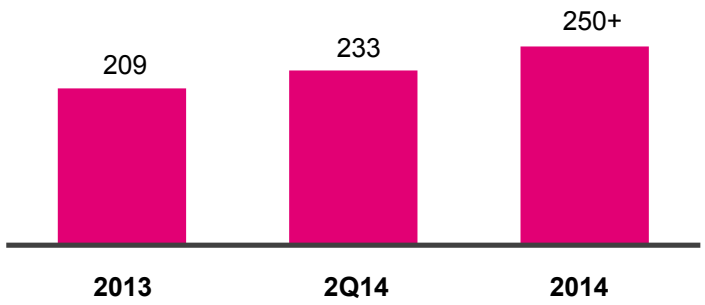
1.5 million Total Net Adds in Q2

- 5th consecutive quarter of over 1 million total net adds
- 6th consecutive quarter of positive customer momentum – value proposition continues to resonate

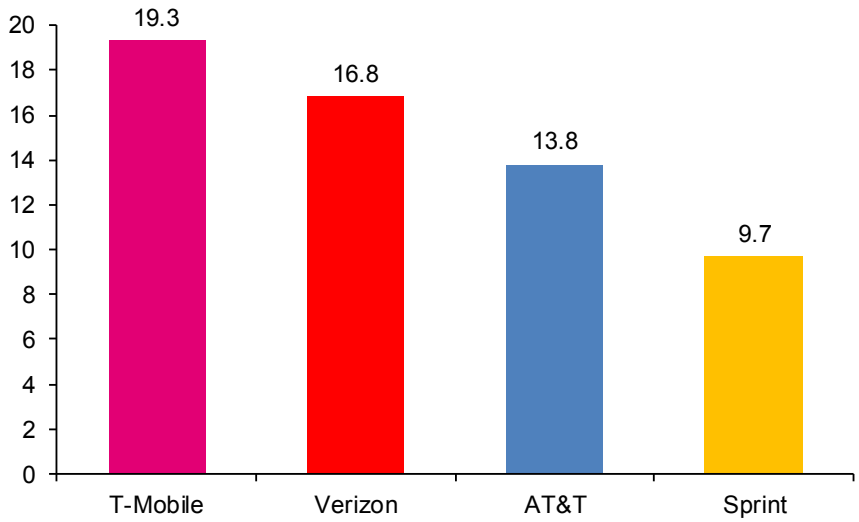
Note: All figures for 2Q13 are pro forma combined results.

Fastest Nationwide 4G LTE Network in the US

4G LTE Covered POPs (M)



4G LTE Speeds[2] – Q2 2014



Continued Expansion of 4G LTE

- 233M+ 4G LTE POPs in 325 metro areas
- First 4G LTE 1900MHz sites on air
- First to launch VoLTE – nationwide as of today

Fastest Nationwide 4G LTE Network in the US[1]

- Continued speed leadership throughout Q2
- 10+10MHz 4G LTE in 43 of Top 50 metro areas
- Wideband LTE live in 17 markets – 26 by year-end

700 MHz A-Block Transaction Lays Groundwork for Further Network Improvement

- 158M POPs covered including 9 of Top 10 and 21 of Top 30 metro areas
- First 700MHz sites on air and first handsets being tested
- Already cleared encumbered A-Block metro areas in 5 markets covering more than 13M POPs on top of many markets already free and clear today

1) Based on download speeds. 2) Based on T-Mobile's analysis of crowd-sourced 4G LTE download speeds.

MetroPCS Integration Continues Ahead of Plan

Spectrum & Market Expansion

- MetroPCS customers with TMUS handsets: 67% at end of Q2 2014
- Approximately 60% of MetroPCS spectrum re-farmed and integrated into the T-Mobile network at end of Q2 2014
- 30 new expansion markets with over 3,100 distribution points at end of Q2 2014 – approaching 10,000 total distribution points

Synergies & One-Time Costs

- CDMA network portion of the MetroPCS markets in Boston, Hartford, and Las Vegas shut down in early July – 2.5 years ahead of initial plan
- Shutdown of CDMA network portion in Philadelphia expected in Q3 with potential for early shutdowns in several additional markets by YE
- One-time shutdown costs of $250 to $300 million expected in 2014
- We expect to provide further updates on our progress when we report year-end results

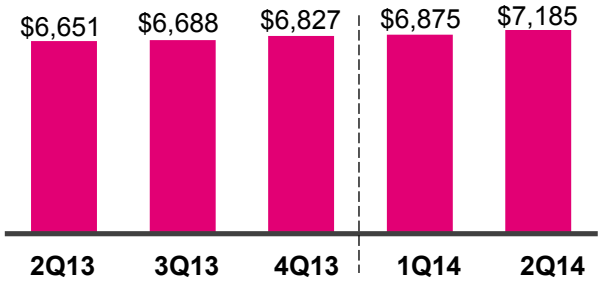
Financial Results

Braxton Carter

CFO

Led the Industry in Revenue Growth

Total Revenues
in millions

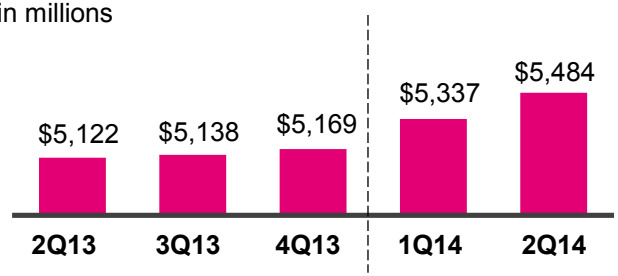


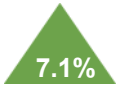
YoY % change

Total Revenue Growth of 8.0% YoY

- 4.5% QoQ growth in Total Revenue
- $1.342 billion of equipment sales financed on EIP vs. $1.249 billion in 1Q14 and $811 million in 2Q13

Service Revenues
in millions

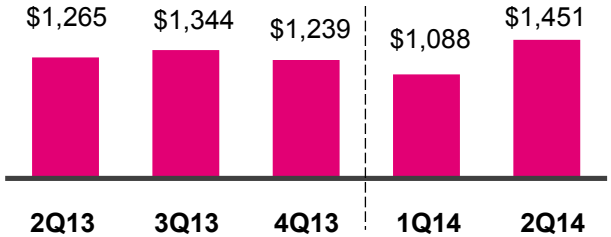




Continued Growth in Service Revenues

- Fifth consecutive quarter of sequential growth in Service Revenue
- 7.1% YoY growth in Service Revenue
- 2.8% QoQ growth in Service Revenue
- Significant customer growth offsetting adoption of lower ARPU Simple Choice plans

Adjusted EBITDA
in millions



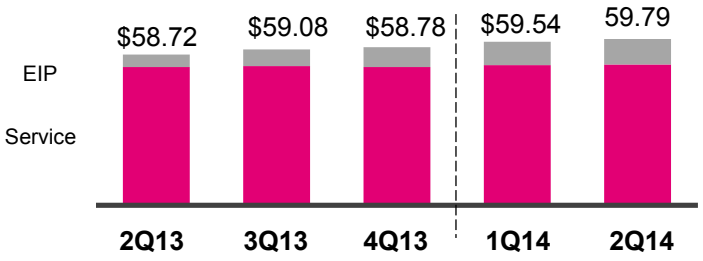
YoY and QoQ Growth in Adjusted EBITDA

- YoY growth of 14.7% and QoQ growth of 33.4%
- Strong smartphone sales of 6.2 million units
- Branded postpaid upgrade rate of 8%; up from 7% in 1Q14 and down from 10% in 2Q13

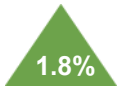
Note: All figures for 2Q13 are pro forma combined results.

Continued Growth in Average Billings Per User (ABPU)

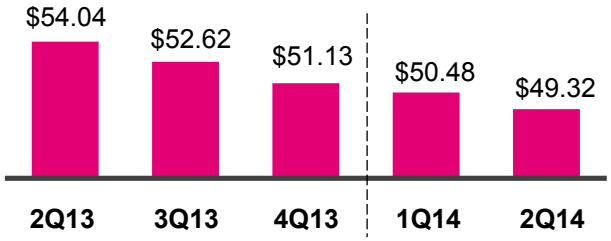
Branded Postpaid ABPU
$ per month



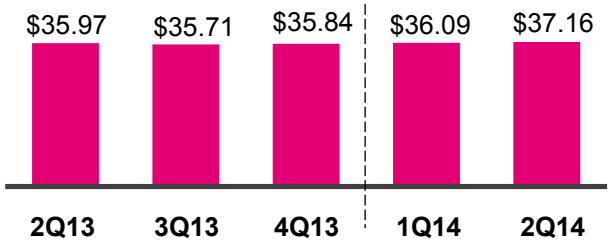
YoY % change



Branded Postpaid Phone ARPU
$ per month



Branded Prepaid ARPU
$ per month



Branded Postpaid ABPU up 1.8% YoY and 0.4% QoQ

ARPU Decline Impacted by Two Non-Recurring Factors

- Branded postpaid phone ARPU impacted by two non-recurring factors: reduction in regulatory surcharges and adjustment for expected refunds on premium SMS charges
- Underlying branded postpaid phone ARPU at $49.93, down 1.1% or $0.55

Customer Quality Continues to Improve

- EIP receivables: 53% Prime
- Prime mix among branded postpaid gross adds improved 9pp YoY

Branded Prepaid ARPU up YoY and QoQ

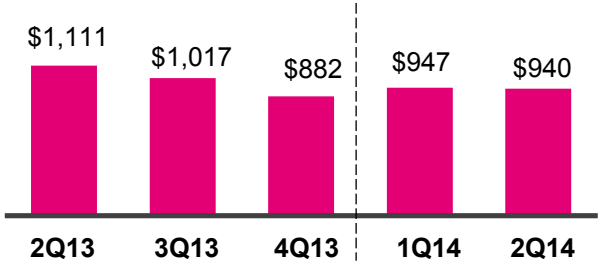
- Growth of 3.3% YoY and 3.0% QoQ
- Reflects growth in MetroPCS customer base

Note: All figures for 2Q13 are pro forma combined results.

Balance Sheet Provides Significant Flexibility

Cash Capex

in millions

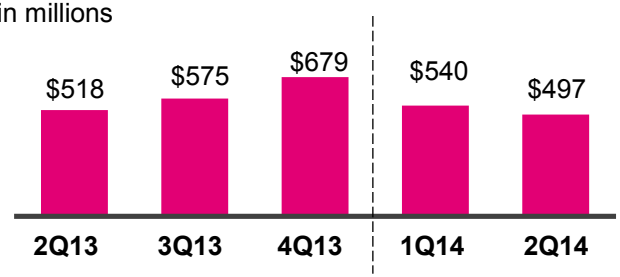


Ongoing Investment in Network Modernization

- FY14 cash capex guidance of $4.3 to $4.6 billion
- Fastest 4G LTE network covering 233M+ POPs in 325 metro areas

QoQ Change in Total Net EIP Receivables

in millions

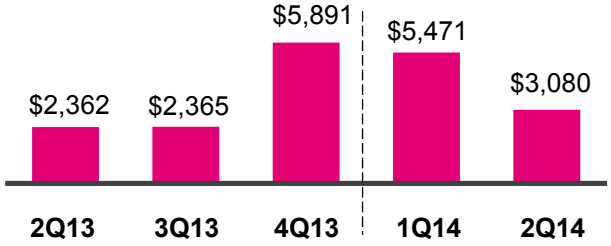


Smaller Increase in EIP Receivables

- Total net EIP receivables of $3.583 billion in 2Q14 compared to $3.086 billion in 1Q14 and $1.292 billion in 2Q13

Ending Cash

in millions



Cash Position Provides for Strong Liquidity

- $3.1 billion ending cash position – decrease due to Verizon A-Block transaction ($2.4 billion)
- $17.2 billion net debt excluding towers
- 3.4x net leverage LTM Adjusted EBITDA

Note: All figures, except ending cash, for Q2 2013 are pro forma combined results. Ending cash amounts are TMUS reported results, not pro forma combined.

Updated Guidance for 2014

2014 Guidance Outlook			
	Original	Q1 2014	Q2 2014
Branded Postpaid Net Adds (in millions)	2.0 – 3.0	2.8 – 3.3	3.0 – 3.5
Adjusted EBITDA (in billions)	$5.7 – $6.0	$5.6 – $5.8	Unchanged
Cash Capex (in billions)	$4.3 – $4.6	Unchanged	Unchanged
Penetration of Simple Choice Plans in Branded Postpaid Base	85% – 90%	Unchanged	Unchanged

Key Messages

1. Fastest Growing Wireless Company in America
   - Industry-leading total and service revenue growth
   - Industry-leading branded postpaid phone and branded prepaid net adds

2. With the Fastest Nationwide 4G LTE Network
   - Cover 233 million Americans in 325 metro areas
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3. And the Best Customer Service Nationwide
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4. We expect our positive momentum to continue into the second half of 2014
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   - No change to Adjusted EBITDA guidance – projecting strong YoY growth in 2014

Note: All figures for 2Q13 are pro forma combined results.

T-Mobile US Q2 2014 Earnings

EXHIBIT 2.E

T-Mobile Doubles Down on Wi-Fi Calling

BY SASCHA SEGAN SEPTEMBER 10, 2014 04:30PM EST 4 COMMENTS

In an exclusive interview, T-Mobile's CTO says high-quality Wi-Fi calling is coming soon.

SAN FRANCISCO – T-Mobile is finally giving Wi-Fi calling its day in the sun. And that means much better T-Mobile coverage in your home, in your basement, and even in the sky.

"Finally, you can talk about a Wi-Fi calling experience which is on par with the security and capacity you have on traditional wireless and cellular networks," T-Mobile CTO Neville Ray said.

T-Mobile phones have been able to make calls over Wi-Fi for a decade. It was the only carrier to sign on with an early standard called Unlicensed Mobile Access (UMA), and more recently, it's used a custom Android app to do the trick. But quality has been shaky, which has prevented T-Mobile from pushing the feature as hard as it could.

As part of its "UnCarrier 7.0" announcement today, T-Mobile is announcing a new version of Wi-Fi calling with HD voice quality and handoffs to and from cellular that will work on Android phones, Windows phones, and the iPhone 6 and

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cellular that will work on Android phones, Windows phones, and the iPhone 6 and 6 Plus. Software updates will roll out to enable it, starting in about 4-6 weeks.

T-Mobile will also offer a customized Asus home Wi-Fi router to any subscriber who wants one. The "T-Mobile Personal CellSpot" will prioritize Wi-Fi calling traffic, making sure that calls come through clearly anywhere in its coverage area. The CellSpot includes patented T-Mobile software to optimize Wi-Fi calls, Ray said.

In a partnership with GoGo, T-Mobile will also offer texting, picture messaging, es

... is the Key

Wi-Fi calling has been a critical part of T-Mobile's mix because of the carrier's relative lack of low-band spectrum, which penetrates buildings. While the carrier recently bought a chunk of 700MHz, low-band spectrum and has just started rolling it out, Wi-Fi digs into interior rooms and basements where no e network can go.

e are customers out there that can't get any cell service [in their homes] – Verizon, or whoever," Ray said.

bile's new solution is part of its recent rollout of voice-over-LTE, which calls off of the old 3G network and put them on the new LTE data network. A e called an enhanced packet data gateway makes Wi-Fi traffic and VoLTE look the same to T-Mobile's network. That will give Wi-Fi calls the same HD quality callers see on the VoLTE network.

bile's phones will be able to make seamless, two-way handoffs between Wi-Fi g and the voice-over-LTE network, which means calls won't drop when ave Wi-Fi range as long as you're in an LTE area. (T-Mobile's LTE calls already hand down to 3G, so you could make another step down at that point.) T-Mobile's earlier UMA system promised handoffs, but didn't usually deliver; its more recent Wi-Fi calling Android app had no handoffs at all.

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That 700MHz spectrum will also improve T-Mobile's in-building coverage. Ray said T-Mobile will be selling a half-dozen 700MHz (Band 12) capable phones by the end of the year, and that "before the end of the quarter, there will be a big expansion of our LTE footprint."

Wi-Fi Calling Stays Home

The Personal CellSpot will still be personal, though – it's a home router. Dealing with the messy reality of public Wi-Fi hotspots will prevent T-Mobile from truly leveraging the amount of Wi-Fi out there in the world Beyond home and work, Wi-Fi hotspots tend to be hard to connect to. Different hotspot networks have different authentication processes, often involving a Web page that a phone can't automatically complete.

Over the past few years, T-Mobile has actually rolled back its access to public hotspots. The company used to run its own public Wi-Fi network called T-Mobile HotSpot; it doesn't any more. Its MetroPCS subsidiary, meanwhile, had a deal with DeviceScape, a company that helps phones automatically connect to public hotspots. That had mixed success as well, and also hasn't spread to T-Mobile as a whole. The Wi-Fi Alliance created a standard in 2012 called Hotspot 2.0 which enables automatic logons, but few hotspots use that.

"That security piece, nobody's fixed that yet for the industry," Ray said. "We're doing all we can to ensure and support our customers in the variety of hotspot environments that are out there ... there's still a battleground on how to provide seamless WiFi access for data in all of these different environments."

So for now, Wi-Fi calling will work to fix coverage at home, he said. "We are attacking that very personal home environment which is that major pain point for folks," he said. "Our major push is to ensure that customers can have this personal cell spot as and where they need it to meet their coverage needs."

BACK TO TOP

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1) Do you plan to purchase any of the following as gifts this holiday season?

// HDTV
// Smart Device for Home
// Smart Watch
// Other Wearable Tech Item
// Phone Case
// None of these

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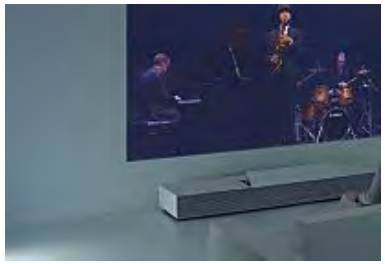

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BY SASCHA SEGAN

LEAD ANALYST, MOBILE

PCMag.com's lead mobile analyst, Sascha Segan, has reviewed hundreds of smartphones, tablets and other gadgets in more than 9 years with PCMag. He's the head of our Fastest Mobile Networks project, one of the hosts of the daily PCMag Live Web show and speaks frequently in mass media on cell-phone-related issues. His commentary has appeared on ABC, the BBC, the CBC, CNBC, CNN, Fox News, and in newspapers from San Antonio, Texas to Edmonton, Alberta. Segan is also a multiple award-winning travel writer, having contributed... **MORE »**

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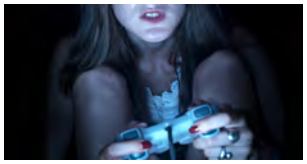

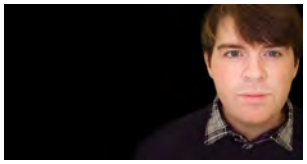

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KpomKwem • a month ago
You go, T-Mo!
Keep up the good work, and leave the competitors in the dust!
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tazman7046 → KpomKwem • a month ago
Now if they only release this capability to users of existing phones NOT purchased directly from T-Mobile like my Nexus 5 from Google and my wife's Moto X from Motorola.
3 • Reply • Share ›

D George C • a month ago
For at least the past two years when I'm at home all of my calls are routed through my home WiFi. The call quality is great, in fact, it's no different than a regular cellular call. I have a Samsung Galaxy SIII phone on T-mobile and Verizon Fios with an Actiontec MI424WR router. The switching between the 2 is so smooth I never have to think about it, it just does it automatically. And as far as any app needed it must be integrated with the phone because I've never had to install anything as it worked from the get go. The only thing that I had to do was enable WiFi calling in settings and enter my router WiFi password. Kudos to T-Mobile for having this option in the first place and now to making improvements to the service.
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16UE • a month ago
If T-Mobile can make WiFi calling as part of any phones that support WiFi, I will go for that. Requiring me to buy a phone that contains imbedded T-Mobile specific software to use WiFi calling, then no, that won't work.
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EXHIBIT 2.F

3GPP TSG RAN WG4 (Radio) Meeting #47 R4-081108
Kansas, USA
5th April to 9th April 2008

Source:	**Motorola**
Title:	**TS36.101: Lower 700 MHz Band 15**
Agenda Item:	**6.1.2**
Document for:	**Discussion**

1 Introduction

This document is presented as a discussion paper to evaluate the need for a new operating band to support block B and block C in the lower 700MHz band. This new operating band would be in addition to that in [1], for UTRA Band XII which supports Block A, Block B and Block C. The rationale for this new band is to address possible co-existence issues with High power TV broadcast transmission in Channel 51 and other broadcast transmission in channel 55 (Block D) and channel 56 (Block E).

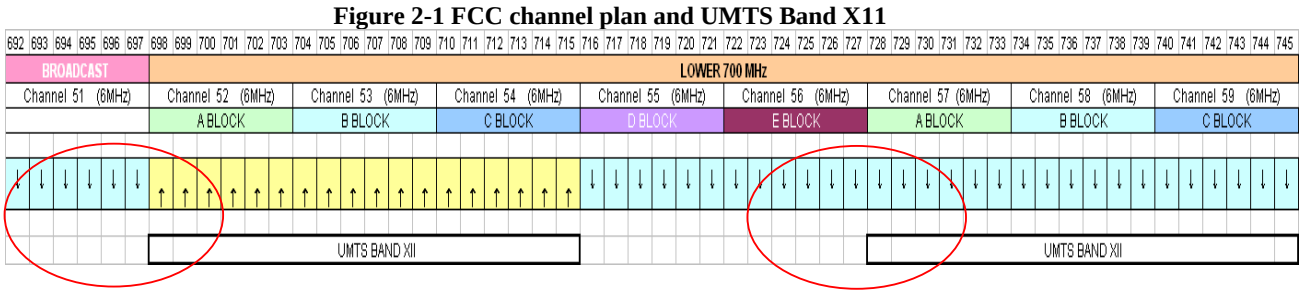
This document provides some of the rationale for this new band and a draft TP for discussion. These discussions should also encompass the future role of Band 12 in terms of either; following the same approach as UTRA in supporting Bands A, B and C, or be limited to Block A and B, in order to complement the proposed new band. In this case, inputs from the relevant spectrum stake holders, would be useful before a final decision can be made

A draft TP is provided for TS36.101 for this new band 15. This is in order to show how this could be implemented in the specification

2 Background

The FCC channel plan and 3GPP UTRA plan [1] is provided below;

Figure 2-1 FCC channel plan and UMTS Band X11



Band XII includes both A block (2x6MHz), B block (2x6MHz) and C block (2x6MHz). Using the FCC channel plan as a base line we note;

a) Per FCC, ERP for channel 51 can be between 500 KW (87 dBm) and 5MW (97 dBm). According to the FCC site (using the stringent mask) emissions must be attenuated 47 dB at the channel edge and no less than 76dB at a 3MHz offset.

   - As A block (Channel 52) is adjacent to Digital TV (channel 51) this would result in a high level of out of band emission into channel 51 (A block) and would place stringent requirements on the adjacent Rx and ACLR performance for a eNodeB operating in the same geographical area. In this case deployment of channel 52 (A block) site would need to be conditioned on the site location of a high power channel 51 transmitter.

b) For a UE operating in a Band 12 configuration (A+ B+ C), this would result in a significant in-band power <u>when roaming near a channel 51</u> broadcast transmitter since limited RF filtering would be available for the adjacent Channel 51 if A block is part of the operating bandwidth. This large in band power would intermod with an existing UE transmission in block A, B and C to generate spurious emission ($2F_1$-F_2) in other parts of

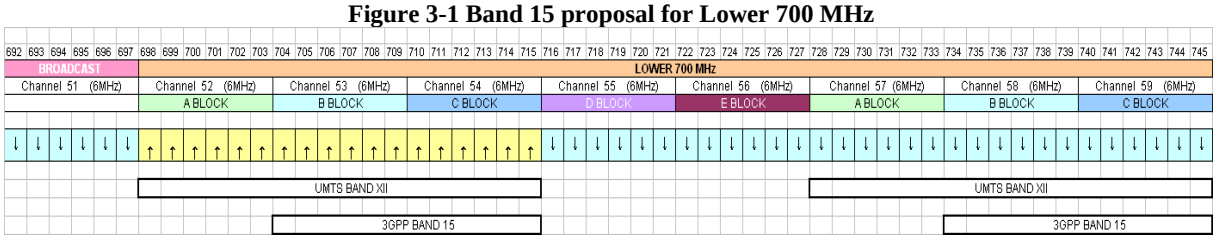
the 700 MHz spectrum. The key issue for Tx IM is the level of the DTV Channel 51 wideband signal that would be present at the UE antenna port based on a reasonable deployment scenario

c) As shown in figure 2-1, there may be some impact performance from high broadcast transmission for channel 55/56 for UE supporting Band 12 (A+ B+ C)as since limited RF filtering would be available to provide adequate UE Rx out of band blocking rejection if A block part of the operating band. Again, the magnitude of this problem is a function of the operator's deployment scenario.

3 Proposal for discussion

In order to address the co-existence issues highlighted in section 2 an additional EUTRA band [15] could be created as shown in figure 2.1-1 below

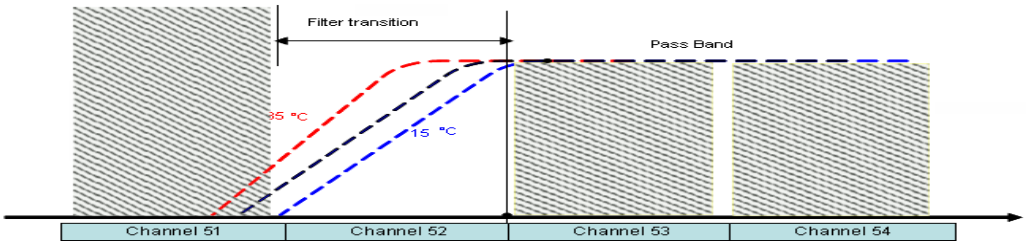
Figure 3-1 Band 15 proposal for Lower 700 MHz



3.1 Impact on Tx IMD and Rx blocking

Based on the operating band in Figure 2.1-1 additional front end RF filtering would be provided by the duplex filter in lieu of block A as shown above in figure 3.1-1 below for both TX IMD and Rx out of band blocker performance

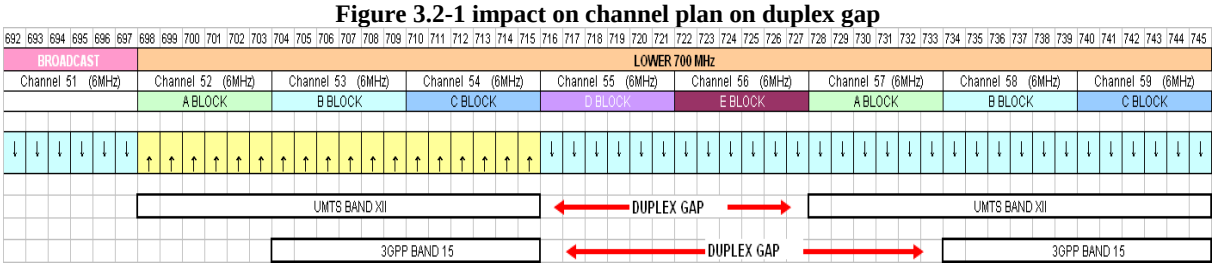
Figure 3.1-1 Channel 52 and 57 used as filter transition



3.2 Impact of duplex performance

The duplex distance for both band 12 (A+ B+ C) and Band 15 (B+C) is shown below in figure 3.2-1. In this case the duplex gap would increase from 12MHz for Band 12 to 18MHz and Band 15 would start to resemble Band V in terms of duplex gap, so we would expect an improvement in terms of Rx sensitivity and Tx output power for Band 15.

Figure 3.2-1 impact on channel plan on duplex gap



3.3 Impact of channel bandwidth / self interference

Self interference is a function of, Tx – Rx spacing, duplex filter performance, Tx power and transmitted RB(s). For a fixed duplex gap the self interference increases with channel bandwidth, transmit power and RB allocation. However, as the same TX-RX spacing is maintained, we would not expect a significant difference in desense performance for either band 12 or band [15].

3.4 Implementation aspects of adding a new operating band

All though there appears to be merit in terms of co-existence performance for the addition of a new operating, the number of operating bands a UE terminal would need to support would increase and some practical limitations may be necessary to reduce implementation complexity. In this scenario roaming between band 12, 13, 14 and 15 could be impacted depending on the number of E-UTRA support bands a UE could support.

4 Proposal / Conclusions

This document provides some of the rationale for this new band 15], and how this could be formulated in the specification for the Lower 700 MHz. A TP draft proposal for E-UTRA operating band is provided

As part of the discussions for band 15 we would welcome further discussion on E-UTRA band 12. In this case it is not clear if Band 12 should be aligned with UTRA Band XII to include Blocks A, B and C or just be limited to Block A and B.. Therefore, we propose to maintain the TBD status until this aspect is clarified.

-------- Start of draft TP for TS36.101 ----------

5.1 General

The channel arrangements presented in this clause are based on the frequency bands and channel bandwidths defined in the present release of specifications.

NOTE: Other frequency bands and channel bandwidths may be considered in future releases.

5.2 Frequency bands

E-UTRA is designed to operate in the frequency bands defined in Table 5.2-1.

Table 5.2-1 E-UTRA frequency bands

E-UTRA Band	Uplink (UL) eNode B receive UE transmit	Downlink (DL) eNode B transmit UE receive	UL-DL Band separation	Duplex Mode
	F_{UL_low} – F_{UL_high}	F_{DL_low} – F_{DL_high}	F_{DL_low} - F_{UL_high}	
1	1920 MHz – 1980 MHz	2110 MHz – 2170 MHz	130 MHz	FDD
2	1850 MHz – 1910 MHz	1930 MHz – 1990 MHz	20 MHz	FDD
3	1710 MHz – 1785 MHz	1805 MHz – 1880 MHz	20 MHz	FDD
4	1710 MHz – 1755 MHz	2110 MHz – 2155 MHz	355 MHz	FDD
5	824 MHz – 849 MHz	869 MHz – 894MHz	20 MHz	FDD
6	830 MHz – 840 MHz	875 MHz – 885 MHz	35 MHz	FDD
7	2500 MHz – 2570 MHz	2620 MHz – 2690 MHz	50 MHz	FDD
8	880 MHz – 915 MHz	925 MHz – 960 MHz	10 MHz	FDD
9	1749.9 MHz – 1784.9 MHz	1844.9 MHz – 1879.9 MHz	60 MHz	FDD
10	1710 MHz – 1770 MHz	2110 MHz – 2170 MHz	340 MHz	FDD
11	1427.9 MHz – 1452.9 MHz	1475.9 MHz – 1500.9 MHz	23 MHz	FDD
12	[TBD] – [TBD]	[TBD] – [TBD]	[TBD]	FDD
13	777 – 787	746 – 756	21	FDD
14	788 – 798	758 – 768	20	FDD
[15]	[704] - [716]	[734] - [746]	[18]	[FDD]
...				
33	1900 MHz – 1920 MHz	1900 MHz – 1920 MHz	N/A	TDD
34	2010 MHz – 2025 MHz	2010 MHz – 2025 MHz	N/A	TDD
35	1850 MHz – 1910 MHz	1850 MHz – 1910 MHz	N/A	TDD
36	1930 MHz – 1990 MHz	1930 MHz – 1990 MHz	N/A	TDD
37	1910 MHz – 1930 MHz	1910 MHz – 1930 MHz	N/A	TDD
38	2570 MHz – 2620 MHz	2570 MHz – 2620 MHz	N/A	TDD

5.3 TX–RX frequency separation

5 References

[1] 3GPP TR25.822 v1.0.0 UMTS 700 MHz Work Item Technical Report

TAB 4

PUBLIC VERSION

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	)	

Declaration of Jonathan Orszag

November 5, 2014

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- A. The analyses offered by WCX's expert Dr. Roetter are flawed and disconnected from the Commission's *Data Roaming Order* 24
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  - 1. WCX's arguments that retail rate-based roaming rates are necessary for WCX's services to be sustainable are flawed 29
  - 2. Even if retail rates were relevant, WCX's proposed rate does not properly reflect retail data rates 31
- C. The usage and resale terms proposed by WCX are not consistent with Commission precedent or sound economic policy 33
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Appendix A: Curriculum Vitae - Jonathan M. Orszag

Appendix B: Tables

I. Qualifications

1. My name is Jonathan Orszag. I am a Senior Managing Director and member of the Executive Committee of Compass Lexecon, LLC, an economic consulting firm. My services have been retained by a variety of public-sector entities and private-sector firms ranging from small businesses to Fortune 500 companies. These engagements have involved a wide array of matters, from entertainment and telecommunications issues to issues affecting the sports and retail industries. I have provided testimony to the U.S. Congress, U.S. courts, the European Court of First Instance, the Federal Communications Commission ("the Commission"), and other domestic and foreign regulatory bodies on a range of issues, including competition policy, industry structure, and fiscal policy.

2. Previously, I served as the Assistant to the U.S. Secretary of Commerce and Director of the Office of Policy and Strategic Planning and as an Economic Policy Advisor on President Clinton's National Economic Council. For my work at the White House, I was presented the Corporation for Enterprise Development's 1999 leadership award for "forging innovative public policies to expand economic opportunity in America."

3. I am a Fellow at the University of Southern California's Center for Communication Law & Policy and a Senior Fellow at the Center for American Progress. I received an M.Sc. in economic and social history from Oxford University, which I attended as a Marshall Scholar. I graduated *summa cum laude* in economics from Princeton University and was elected to Phi Beta Kappa.

4. While I served in the federal government, I worked on a number of policy issues involving the telecommunications sector, including policy matters affecting the wireless industry. Since leaving government, I have been active in applied analysis of issues affecting the telecommunications sector. For example, I have written about wireless spectrum auctions; analyzed policy issues affecting the mobile wireless industry; and analyzed a number of mergers between wireless companies.

5. My full *curriculum vitae*, including a listing of my prior testimony, is included as Appendix A.

II. Assignment and Summary of Conclusions

6. I have been asked by counsel for AT&T Mobility ("AT&T") to review Worldcall Interconnect, Inc. a/k/a Evolve Broadband's ("WCX") complaint regarding AT&T's alleged violation of its obligations to provide data roaming on "commercially reasonable" terms.[1] I have also been asked to review the data roaming agreements proposed by AT&T and WCX to assess, from an economic perspective,

---

[1] Amended Complaint, *WorldCall Interconnect, Inc. a/k/a Evolve Broadband, v. AT&T Mobility, LLC.*, October 1, 2014 (hereinafter, *Amended Complaint*), at ii. WCX does not seek damages. *See also* Complaint, *WorldCall Interconnect, Inc. a/k/a Evolve Broadband, v. AT&T Mobility, LLC.*, September 8, 2014 (hereinafter, *Complaint*).

whether the agreements meet the "commercially reasonable" standard as defined by the Commission in the *Data Roaming Order*.[2]

7. WCX provides wireless mobile services in certain portions of Texas.[3] According to WCX, its coverage area is currently more than 35 percent of the Cellular Market Area ("CMA") 667.[4] This CMA is adjacent to the CMAs covering Austin, Houston and San Antonio, Texas, where AT&T and other wireless providers have deployed 4G Long Term Evolution ("LTE") service.[5]

8. The *Amended Complaint* alleges that:

   - WCX is a new entrant and has no roaming agreements with any other provider.[6]
   - WCX is solely LTE-based, so its options are limited to LTE networks using compatible technology and frequencies.[7]
   - AT&T is the only potential roaming supplier that is currently technically compatible with WCX.[8]
   - AT&T has failed to offer a roaming arrangement that contains commercially reasonable terms and conditions.[9]
   - AT&T's proposal and its pricing "are so unreasonable as to be tantamount to a refusal to offer a data roaming arrangement."[10]

9. WCX has submitted the *RWA Model Agreement* as the proposed data roaming contract between AT&T and WCX.[11]

10. Based on my analysis, I have reached the following conclusions:

    - I have seen no evidence that AT&T's terms and conditions are tantamount to a refusal to deal. AT&T's proposal contains terms and conditions entirely consistent with those included in

---

[2] Second Report and Order, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, 26 FCC Rcd. 5411, April 7, 2011 (hereinafter, *Data Roaming Order*).

[3] *Amended Complaint*, ¶ 1.

[4] Declaration of Lowell Feldman, September 8, 2014 (hereinafter, *Feldman Declaration*), ¶ 22.

[5] *Amended Complaint*, ¶ 22.

[6] *Id.*, ¶ 22.

[7] *Id.*, ¶ 6.

[8] *Id.*, ¶ 22.

[9] *Id.*, ¶ 41 and § VI.

[10] *Id.*, ¶ 92.

[11] *Id.*, ¶ 11. WCX's proposed agreement is attached as Exhibit 1 to the *Feldman Declaration* (*see Complaint,* at 56-82) (hereinafter, *RWA Model Agreement*).

dozens of arm's length contracts between AT&T and other independent wireless providers, many of which are rural carriers.

- The rates offered by AT&T for 4G LTE-based roaming match the rates AT&T has agreed upon in recent LTE agreements with independent wireless providers; and these rates are well below the average effective roaming rates that AT&T pays to other domestic carriers, the average effective rates in the dozens of commercial agreements AT&T has negotiated since the Commission's *Data Roaming Order*, the average effective rates negotiated between AT&T and other rural wireless providers, and the average roaming rates T-Mobile has reported.
- The usage and resale provisions proposed by AT&T are also entirely consistent with agreements executed between AT&T and independent wireless providers. From an economic perspective, such provisions are both (i) necessary to avoid free-riding on AT&T's network investments and (ii) entirely consistent with the Commission's goal of making roaming available to local customers that travel outside their home service area while ensuring that roaming is not employed as a backdoor way to resell data services. Other provisions proposed by AT&T (*e.g.*, audit rights and the ability to suspend service) are consistent with terms and conditions in other agreements and are necessary to enforce the provisions of the proposed roaming agreement.
- I find no support for WCX's claim that it is wholly dependent on AT&T for roaming. There are a number of other wireless providers with data networks in the areas adjacent to WCX's service area (and in other areas throughout the nation) and multi-band handset technology is such that WCX's customers could roam on these other networks.
- WCX's proposed data roaming rates, which WCX claims are based on a benchmark of retail rates, are not consistent with Commission precedent, are not commercially reasonable, and are not consistent with rates that would produce an efficient allocation of economic resources.
- WCX's proposals regarding usage and resale are not consistent with the Commission's goal of encouraging investment and the Commission's admonition that roaming not be employed to provide services that "piggy back" on another carrier's network. Similarly, other provisions in WCX's proposal are not commercially reasonable in that they do not provide adequate mechanisms to monitor compliance with and enforce reasonable usage and resale provisions and have not been "road tested" through arm's length agreements (at least ones that either WCX or AT&T have entered into).

11. In the following sections, I describe in more detail the facts and analyses that lead to these conclusions. My opinions may be revised in light of any new evidence that may emerge. I, therefore, reserve the right to incorporate such evidence into my analysis.

III. Wireless Industry Background

12. The wireless industry is characterized by a rapidly changing evolution toward a more efficient use of spectrum; a multitude of handset and device manufacturers seeking to present new, innovative

features to the marketplace; software companies developing new applications for mobile devices; and an increased demand from consumers in terms of connectivity and functionality.

13. These four elements of innovation in the marketplace work together to drive wireless companies to invest continuously in infrastructure in order to provide customers with reliable data-driven connectivity. It is essential to the efficient allocation of economic resources that roaming agreements between wireless carriers are structured to ensure that they do not discourage companies from making these infrastructure investments.

14. The LTE standard is currently the most advanced stage in the evolution of wireless technology with an "LTE Advanced" standard already in the early stages of deployment by AT&T and other carriers.[12] U.S. carriers' invest tens of billions of dollars annually in wireless infrastructure.[13] Such investments are the result of substantial competition among facilities-based carriers to provide consumers with the most advanced broadband infrastructure paired with the latest devices to exploit those investments fully. AT&T, for example, invested approximately $11 billion in 2013 to expand and enhance its wireless network.[14] During the same year, U.S. mobile data traffic grew by 75 percent.[15] Such increases in data usage were driven by at least four interconnected trends: (i) the growth in mobile device connections, including multiple connections held by the same subscriber; (ii) the growing use of data-only devices, such as modems, hot spots, e-readers, and tablets; (iii) the increased popularity of higher-bandwidth mobile applications; and (iv) the deployment of faster networks.[16]

15. The competitiveness of the wireless industry is evidenced by the number of options available to consumers for wireless providers and devices. Today, there are four nationwide wireless providers and numerous regional carriers. As of October 2012, approximately 97 percent of the U.S.

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[12] *See, e.g.,* FierceWireless, "AT&T lights up LTE Advanced carrier aggregation in Chicago, other markets," March 7, 2014, http://www.fiercewireless.com/story/att-lights-lte-advanced-carrier-aggregation-chicago-other-markets/2014-03-07 (*accessed* October 30, 2014).

[13] U.S. carriers invested $260 billion in the last 10 years and $33 billion in the last year alone. *See* CTIA-The Wireless Association, "Wireless Quick Facts: Investment," http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts; and "Background on CTIA's Wireless Industry Survey," http://www.ctia.org/docs/default-source/Facts-Stats/ctia_survey_ye_2013_graphics-final.pdf?sfvrsn=2 (*accessed* October 20, 2014).

[14] *See* AT&T Inc. 2013 Annual Report, at 7, 29. AT&T spent approximately the same amount in its wireless network in 2012. *See* AT&T Inc. 2012 Annual Report, at 49.

[15] According to Cisco, mobile data traffic in 2013 was equivalent to approximately 50 times the mobile data traffic in 2008. *See* Cisco, "VNI Mobile Forecast Highlights, 2013 – 2018, 2013 Year in Review (United States)," http://www.cisco.com/assets/sol/sp/vni/forecast_highlights_mobile/index.html#~Country (*accessed* October 30, 2014).

[16] *See, e.g.,* Federal Communications Commission, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 11-186, March 21, 2013 (hereinafter, *FCC Sixteenth Competition Report*), at 12.

population was covered by the networks of at least three mobile voice providers and 92 percent had a choice of three or more mobile broadband data providers.[17] The dynamic competition in smartphones also creates a virtuous cycle of competition, innovation, and increased consumer welfare. From 2006 to 2012, for example, the number of mobile wireless handset manufacturers that distribute in the U.S. market increased from 8 to 23. During June 2012, these 23 handset manufacturers offered a total of 266 handset models to mobile wireless service providers. In fact, nine of these handset manufacturers offered at least 10 handset models.[18] Launches of popular handset models are often quickly followed by newer, more innovative models with updated operating systems that offer new features and better exploit the bandwidth provided by the latest network investments.

16. Rural wireless providers continue to be an important and successful element of competition in the wireless industry. Rural providers must also invest in their networks to maintain relevance in the eyes of consumers, and these providers also strive to offer similar handsets and connectivity following the lead of the major facilities-based providers. According to the Commission, there are approximately 95 regional and local wireless service providers in the continental U.S., Hawaii, and Alaska, most providing service in more rural areas.[19] According to the NTCA (the Rural Broadband Association), the population density in most NTCA member service areas is between one and five persons per square mile. Even in these rural areas, 75 percent of its members indicated that "competition from national carriers" was a major factor with at least half the members competing with between two to five other providers in their service areas. In response to this competition, 43 percent of the responding members stated that they plan to deploy LTE technology.[20]

17. These rural providers have either successfully negotiated a roaming contract or developed a successful business model that can sustain the firm without one. In addition to these smaller providers, there are many resellers and Mobile Virtual Network Operators ("MVNOs") that purchase wholesale data and minutes from larger facilities-based providers and resell to consumers who do not fit the standard wireless model; for example, consumers who are relatively more price sensitive, do not want to commit to multi-year subscription contracts, have only emergency or otherwise low usage needs, or do not want to buy a bundle that contains unwanted data services. AT&T is the largest provider of wholesale connections to these wholesale purchasers, and TracFone is the largest MVNO with over 19 million subscribers.[21]

18. From the consumer's perspective, the service area of WCX is similar to the service areas of many other local providers in the U.S. The four national facilities-based providers all offer service in WCX's

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17 *FCC Sixteenth Competition Report*, ¶¶ 45, 48.

18 *FCC Sixteenth Competition Report,* ¶ 343 (Table 44).

19 *FCC Sixteenth Competition Report*, ¶ 28.

20 *FCC Sixteenth Competition Report*, ¶ 402.

21 *FCC Sixteenth Competition Report*, ¶¶ 33-34.

license area. Specifically, AT&T, Verizon Wireless ("Verizon"), Sprint Corp. ("Sprint"), and T-Mobile US, Inc. ("T-Mobile") appear to all be present in WCX's service area offering LTE service, and MVNO TracFone also offers 4G LTE service in that area.[22] Competition is also intense in the adjacent CMAs, which include major metropolitan areas such as Austin, Houston, and San Antonio.[23]

IV. The Role of Data Roaming and the Commission's "Commercially Reasonable" Standard

19. A data roaming agreement is a commercial arrangement between two providers of mobile data services that enables customers with mobile data plans to remain connected and access services, such as e-mail and broadband Internet, when they are away from home and outside their own network provider's coverage area. In order to ensure that wireless carriers are able to provide service for customers when they travel outside their provider's home network, and with the purpose of making those services more competitive, the Commission has adopted rules requiring facilities-based providers of mobile data services to offer data roaming to other wireless carriers on *commercially reasonable* terms and conditions.[24]

20. A key goal of the Commission's data roaming rules was to provide incentives for new entrants and incumbent providers to invest in building out their networks.[25] Although the Commission required providers to offer data roaming, it recognized the need to preserve the investment incentives for both requesting providers and host providers. With respect to requesting providers, the Commission noted the possibility that they would under-invest in deploying new infrastructure.[26] This is because requesting providers may find it more profitable to use roaming and rely on other providers' network investments than making their own capital investments to expand and upgrade their networks. With respect to host providers, the Commission noted that they may also have a

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22 AT&T Texas Data Coverage Map, "AT&T Domestic Wireless Data Coverage Maps," http://www.att.com/maps/wireless-coverage.html#fbid=WGw7pJI9hJB; Verizon 4G LTE Coverage, "Verizon 4G LTE Data Coverage Maps," http://www.verizonwireless.com/wcms/consumer/4g-lte.html; Sprint Texas Data Coverage, "Sprint Coverage Check," http://coverage.sprint.com/IMPACT.jsp?; T-Mobile Texas 3G/4G/LTE Coverage Map, "T-Mobile Personal Coverage Check: 3G/4G/LTE Smartphone Signal Strength," https://www.t-mobile.com/coverage/pcc.aspx/; and Tracfone Texas Coverage Map, "Tracfone: Coverage," https://www.tracfone.com/direct/controller.block (*accessed* October 23, 2014).

23 *Id.*

24 *Data Roaming Order*, ¶¶ 1, 9, 42.

25 *See, e.g., Id.*, ¶ 9: "we sought to ensure that consumers have access to seamless coverage nationwide, to provide the incentives for new entrants and incumbent providers to invest and innovate by using available spectrum and constructing wireless network facilities on a widespread basis, and to promote competition for commercial mobile broadband business by multiple providers." *See also Id.*, ¶¶ 1, 34, 64.

26 *Id.*, ¶ 34.

disincentive to invest in their networks when other providers can "piggy back" – or free-ride – on their investment via roaming.[27] Both concerns reflect sound economic reasoning.[28]

21. In establishing the commercially reasonable standard for data roaming rates, the Commission sought to balance the core policy goal of widespread availability of data roaming with the need to encourage facilities-based investment.[29] To do so, the Commission declined to impose specific rate regulations, but rather sought to rely on arm's length contract negotiations between providers to set the terms for data roaming.[30]

22. The Commission explicitly acknowledged two key components of commercially reasonable rates that would be instrumental in preserving incentives for investments in the build-out and upgrading of facilities-based networks. First, the Commission noted that host providers will continue to have the incentive to invest because they "will be paid" for providing data roaming service and that "the relatively high price of roaming" will also counterbalance the requesting providers' incentive to "piggy back" on another carrier's network.[31] Second, the Commission noted that other terms and conditions in provider agreements ensure that a subscriber's roaming on other networks does not become too large a part of the subscriber's service use and also safeguard against network congestion or harm that might result from data roaming traffic.[32]

23. The Commission understood that these roaming limitations in commercially reasonable agreements would make it unlikely for providers to rely on roaming arrangements in place of network deployment, thereby preserving incentives for investment.[33] Roaming is distinct from resale and the Commission sought to ensure with the *Data Roaming Order* that "roaming arrangements cannot be used as a backdoor way to create *de facto* mandatory resale obligations."[34]

24. The economic logic for the reliance on commercially reasonable agreements is simple. Providers in the wireless industry compete along a variety of dimensions, including the scope and quality of their network coverage, which is the result of large investments in building their networks. Rates obtained from arm's length negotiations in competitive markets protect them from other providers free-riding on these network investments. These rates will further reflect the specific characteristics of the required infrastructure and any strategic considerations within the context of the negotiation.

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27 *Id.*, ¶¶ 21, 33.

28 *See also* discussion in ¶¶ 38-40 below.

29 *Id.*, ¶¶ 13, 40, 48.

30 *Id.*, ¶ 21.

31 *Id.*, ¶¶ 21, 51.

32 *Id.*, ¶¶ 21, 23, 35, 52.

33 *See, e.g., Id.*, ¶ 21.

34 *See Id.*, n. 122. *See also Id.*, ¶¶ 34, 38, and n. 116; and Report and Order and Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817, August 7, 2007 (hereinafter, *Voice Roaming Order*), ¶ 51.

If host providers were required to offer roaming at below-market rates, requesting providers might have the incentive to build their businesses by offering services based on the networks of other providers. In declining to regulate rates or otherwise impose benchmark rates, the *Data Roaming Order* effectively protects providers from the free-riding problem.[35]

25. It is important to distinguish roaming agreements from resale agreements. Roaming occurs when a subscriber of a facilities-based provider that resides in that provider's service area makes incidental use of another provider's network while physically located outside of the home provider's service area. To deliver the roaming service, the home provider negotiates a roaming agreement with the other provider. Resale, in contrast, occurs when a wireless provider (whether a pure reseller or MVNO, or a partially facilities-based provider seeking to offer retail services more broadly than its own network coverage area) seeks to make more than incidental use of another provider's network, by, for example, purchasing wholesale mobile wireless services from a facilities-based provider and reselling those services to retail consumers that reside in that facilities-based provider's home markets. Resellers add value by establishing the relationship with their customers and performing all marketing, billing, and customer service functions for their customers. In this sense, they compete with facilities-based providers by offering different mobile plans and pricing. Facilities-based providers compete with each other to offer network coverage to resellers and MVNOs.[36]

26. Similarly, there is a clear distinction between roaming and retail service rates and terms. As discussed in more detail in Section VI.B.2, retail service is typically offered to end customers in packages that include a bundle of goods (*e.g.*, handsets, tablets) and mobile services (*e.g.*, voice, SMS, voicemail, cloud storage, etc.) for a monthly charge, and additional overage charges if the subscriber exceeds the monthly allowance for each service. In addition, retail data rates are typically calculated on the basis of "buckets" of data, for each customer, at a fixed price – *e.g.*, $15 for any data usage ranging from one kilobyte (KB) to one gigabyte (GB). As a result, the effective rate per KB paid by the consumer is always higher than the advertised rate—unless the consumer uses *exactly* the maximum amount of data allowed by the plan. These rates therefore cannot be directly compared to data roaming rates, which do not typically include monthly charges for other services,

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[35] *Data Roaming Order*, ¶ 21. *See* also *Voice Roaming Order*, ¶ 40: "regulation to reduce roaming rates has the potential to deter investment in network deployment by impairing buildout incentives facing both small and large carriers. By enabling smaller regional carriers to offer their customers national roaming coverage at more favorable rates without having to build a nationwide network, rate regulation would tend to diminish smaller carriers' incentives to expand the geographic coverage of their networks."

[36] *See, e.g., FCC Sixteenth Competition Report*, § III.B.2. The Commission notes that there are hybrid models in which small carriers operate as facilities-based providers in their service areas and sign MVNO agreements with other carriers outside their footprint, thus enabling them to legitimately sell mobile services in a broader geographic area. Cricket Wireless (Leap), for example, had this business model with Sprint, before being acquired by AT&T. *See Id.*, ¶ 30.

are billed on a per-KB basis, and do not require purchasing buckets of data for each roaming customer.[37]

A. Commercially Reasonable Data Roaming Rates

27. The Commission's commercial reasonableness standard allows for a broad range of outcomes by giving parties the flexibility required to negotiate agreements tailored to individual circumstances and to preserve providers' incentives to build out their networks. Subject to the commercially reasonable standard, host providers are given "appropriate discretion in the structure and level of such rates that they offer."[38]

28. The foundation of the commercially reasonable standard is the terms and conditions that result from arm's length negotiations between wireless carriers. It is not a cost recovery standard or a reasonable rate of return standard. Roaming rates that result from market-based agreements can be expected to be above average costs or retail prices because these rates reflect potential congestion and excess capacity investments required to handle roaming traffic. Market-based rates further reflect the opportunity costs of network capacity, including the opportunity to sell the capacity to other roaming partners, resellers or MVNOs; to provide additional services to the host carrier's own customers; and to preserve network capacity to enhance network reliability, to insure against peaks in demand, and to be able to cover future growth in demand in an industry characterized by "lumpy" investments.

29. Market-based rates may also vary according to the particular spectrum, topography, existing and planned build out, population density, volume of data used, credit risk posed by the roaming partner, and customer demographics that drive the ability to serve wireless customers. By contrast, a regulated rate based on an average of retail rates (or average costs) would ignore this heterogeneity. Indeed, the *Data Roaming Order* recognizes that data roaming rates would be tied to specific, individual circumstances.[39]

30. A commercially reasonable agreement will reflect all of these market realities without requiring the Commission to try and quantify all the idiosyncratic factors that affect roaming rates. For the purposes of providing guidance, however, the Commission listed seventeen factors that it "may" consider in the assessment of whether a particular data roaming offer includes commercially reasonable terms and conditions.[40] The factors identified by the Commission can generally be grouped into the following categories:

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[37] [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]

[38] *Data Roaming Order*, ¶ 21. The Commission also makes clear that host providers do not have to "serve all comers indiscriminately on the same or standardized terms." *Id.*, ¶ 45.

[39] *Id.*, ¶ 68.

[40] *Id.*, ¶¶ 2, 85-86.

- *Negotiation Factors*: how the host provider has responded to the request for negotiation (*e.g.*, potential stonewalling, unreasonable offers); whether the parties have or have had any roaming arrangements (and the terms of such agreements).
- *Competitive Factors*: competitive harm/benefits to consumers; the impact on incentives for either provider to invest; the extent of providers' build-out in the data roaming area (including the presence of alternative roaming partners, the feasibility of building another network, and whether the requesting provider is already providing facilities-based service).
- *Technical Factors*: technological compatibility and feasibility; whether changes to the host network are necessary to accommodate the request.

B. Criteria for Assessing Commercial Reasonableness

31. I have analyzed, as an economist, the commercial reasonableness of the data roaming agreements proposed by AT&T and WCX during the negotiation process using the factors identified by the Commission. I have assessed, from an economic perspective, the applicability of each factor to the facts of this case. In performing this analysis, I have:

- Reviewed the history of the parties' negotiations;
- Compared the rates and other terms in the proposed agreements to existing data roaming agreements between AT&T and other providers (and, based upon publicly available information, the rates in agreements between T-Mobile and other providers);
- Examined the specific competitive conditions both in WCX's home service area and adjacent service areas;
- Analyzed the impact that the proposed agreements would have on incentives to build out networks (in particular, whether the proposed agreements would meet the Commission's goals of providing roaming to subscribers when travelling outside their home area but at the same time would have provisions to discourage free riding on network investments);
- Evaluated WCX's alleged need for data roaming services to determine whether its proposed uses comport with the Commission's objectives; and
- Evaluated the validity of WCX's claim that AT&T is its only potential data roaming partner and inquired to determine whether there were any other technical issues.

32. In making my economic assessment, I have paid particular attention to data roaming agreements previously executed by AT&T. One of the factors the Commission considers in determining the reasonableness of the terms and conditions of a data roaming offer is whether "the providers involved have had previous data roaming arrangements with similar terms."[41] In particular, the

[41] *Id.*, ¶ 86.

Commission will "presume" that the terms of a signed agreement meet the reasonableness standard.[42] Such a perspective is entirely consistent with sound economics.[43]

33. As a result, one can analyze existing data roaming agreements between AT&T and other providers to assess whether the rates and other conditions in those agreements are consistent with what AT&T (and WCX) proposed during the negotiation process—under the presumption that signed agreements with other providers that resulted from arm's length negotiations meet the commercially reasonable standard. (Since WCX has no data roaming agreements in place, I focus on AT&T's data roaming agreements.) Moreover, a proposed agreement is unlikely to amount to a refusal to deal when similar agreements have been accepted by other providers in a similar position as WCX. I turn to this evidence in Sections V and VI.

34. Based on that review, I have concluded that the key factors at issue relate primarily to the negotiation factors and competitive factors. My specific assessments of the parties' proposed agreements are set forth in the next two sections.

V. AT&T's Proposed Roaming Agreement Is Commercially Reasonable

35. On July 29, 2014, AT&T submitted to WCX its latest proposed data roaming agreement.[44] This proposal contained terms and conditions generally consistent with AT&T's current template agreement and dozens of roaming agreements AT&T has executed with other providers.[45] In fact, the *AT&T Proposed Agreement* contained roaming rates that were below the average effective rate AT&T had negotiated with other providers and below the average effective rate that AT&T currently pays to roam on other providers' networks.[46]

36. The *AT&T Proposed Agreement* included, among other terms, the following terms and conditions:

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[42] *Id.*, ¶ 81.

[43] *See* discussion in ¶¶ 24, 28-30, above.

[44] *See* Declaration of Gram Meadors, November 5, 2014 (hereinafter, *Meadors Decl.*), Ex. 5. (hereinafter, *AT&T Proposed Agreement*). In July 2011, AT&T provided WCX with its first proposed agreement, based on AT&T's current Domestic LTE Template Agreement (hereinafter, *AT&T 2011 Template Agreement*). *See Complaint*, at 812-849.

[45] *See Meadors Decl.*, Ex. 2 (AT&T's Domestic LTE Template Agreement) (hereinafter, *AT&T Template Agreement*).

[46] I also note that in any commercial contract with multiple provisions there are always *trade-offs*. A contract includes a list of rights and obligations of the parties, which can vary according to the specific spectrum, consumer demand, and other technical factors relevant to the market area. As such, one cannot take a single provision in the contract and analyze it in isolation, or compare that particular provision with those in other agreements and, on that basis alone, assess whether it is commercially reasonable. The Commission recognized as much in the *Data Roaming Order*, ¶ 85 (requiring "case-by-case" analysis "taking into consideration the totality of the circumstances").

- *Rates*: The *AT&T Proposed Agreement* includes a rate of [BEGIN CONFIDENTIAL] [END CONFIDENTIAL].[47]
- *Usage and Resale*: AT&T proposed to restrict WCX's roaming on AT&T's network to [BEGIN CONFIDENTIAL] [END CONFIDENTIAL].[50]
- *Monitoring Traffic and Congestion*: The *AT&T Proposed Agreement* allows AT&T to suspend the service to WCX when [BEGIN CONFIDENTIAL] [END CONFIDENTIAL].[51]
- *Auditing and Enforcement*: [BEGIN CONFIDENTIAL] [END CONFIDENTIAL][52]
- *Termination*: The *AT&T Proposed Agreement* provides for [BEGIN CONFIDENTIAL] [END CONFIDENTIAL].[53]

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47 *AT&T Proposed Agreement,* § 8 and Exhibit 8.

48 A subscriber is a [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]. *Id.*, § 1.

49 *Id.*, § 11. With respect to permanent roaming, the *AT&T Proposed Agreement* (§ 11.b) states: [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]

50 *Id.*

51 *Id.*, § 17.

52 *Id.,* §§ 11, 17, and Exhibit 8.

53 *Id.*, §§ 2, 20.

37. AT&T's proposed terms and conditions are largely based on its template roaming agreement. I find it reasonable for AT&T to rely on its own template as a starting point, as opposed to WCX's proposed *RWA Model Agreement*, as AT&T has relied on this template and similar terms and conditions in dozens of agreements with other providers. In addition, the *AT&T Proposed Agreement* contains additional terms and conditions not included in the *RWA Model Agreement*, which are generally included in data roaming contracts. This includes provisions related to, for example, area restrictions, each party's affiliates, and customer care.[54]

38. The first two factors the Commission considers in the assessment of whether a particular data roaming offer is commercially reasonable is whether the host provider's offer is so unreasonable as to be tantamount to a refusal to deal and whether the host provider has engaged in a pattern of "stonewalling," rather than timely responding to the request for negotiation.[55]

39. The best way to look at whether the terms in AT&T's offer amount to a refusal to deal is to compare this offer with agreements that have been accepted in the marketplace. As discussed in greater detail below, I find AT&T's proposal consistent with the terms found in arm's length agreements between AT&T and other providers, many of which are rural carriers. The *AT&T Proposed Agreement* incorporates well-established standard terms and conditions that other companies in a similar position as WCX have found commercially reasonable. AT&T currently has 35 data roaming agreements negotiated on an arm's length basis with other providers, about two thirds of which have been executed or amended since the release of the *Data Roaming Order*. In addition, throughout the negotiation process, AT&T accurately represented to WCX that the rates proposed by AT&T were below the average rates AT&T was paying for domestic roaming.[56]

40. Moreover, as I explain below, the *AT&T Proposed Agreement* is consistent with the Commission's goal of striking an appropriate balance between access to data roaming and incentives to build-out networks, which is grounded in sound economics. Since the *Data Roaming Order*, AT&T and its roaming partners have continued to build out their networks at the same time that the volume of data roaming has substantially increased and prices for data roaming have continued to fall.[57]

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[54] *See Id.*, §§ 10, 12, and Exhibit 4, § 1.10.

[55] *Data Roaming Order*, ¶ 86.

[56] *See Complaint*, at 452, 622, 625, and 755. In terms of response time, I note that AT&T previously offered roaming terms and conditions to WCX in 2011, before WCX had started to undertake a "greenfield" deployment in CMA 667 and before WCX had any customers. WCX did not accept those terms and did not pursue any type of data roaming agreement with AT&T until June 2014. When discussions resumed in June 2014, the parties typically responded within days to each other's requests. *See* Letter from Matthew A. Henry, Counsel for WCX, to Lisa Saks and Lisa Boehley, Federal Communications Commission, Nov. 21, 2011, at 4 (also available in *Complaint*, at 635). *See also* documents in *Complaint*, at 301-581.

[57] For example, Dr. Joseph Farrell showed that the average price per MB paid by T-Mobile for data roaming has fallen dramatically in recent years. *See* Declaration of Joseph Farrell, D.Phil., In Support of Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc., May 19, 2014 (also available in *Complaint*, at 96-136) (hereinafter, *Farrell Declaration*), Table 6.

41. In the following sections, I apply the Commission's factors to assess the commercial reasonableness of AT&T's proposal. First, as a general matter, I find that there are many potential roaming partners for WCX in the areas adjacent to its service area and nationwide and that there is no technological constraint limiting WCX to partnering with AT&T. Second, I have determined that the rates AT&T offered WCX are consistent with the data roaming agreements AT&T has entered with other carriers and therefore market-based and commercially reasonable. Third, I have reviewed the usage and resale restrictions that AT&T proposed and find that these restrictions are consistent with both AT&T's other roaming agreements and the Commission's policy objectives. Lastly, I address other AT&T-proposed terms with which WCX takes issue and conclude that they are commercially reasonable because they are common provisions in AT&T's roaming agreements generally and appropriate to manage the roaming arrangement with WCX specifically.

A. I find no support for WCX's claim that it is wholly dependent on AT&T for roaming

42. The Commission's commercial reasonable standard considers the competitive conditions in the relevant market areas and whether alternative data roaming partners are available for the requesting provider.[58] As noted, there are many LTE networks in the areas adjacent to WCX's service area and nationwide. In general, what limits a facilities-based provider's ability to roam on a particular LTE band (not carrier) is the choice of devices that the provider makes available to its customers. It is WCX's business decision as to which devices to offer. A rational decision maker building a "greenfield" network would optimize the cost of devices relative to the cost of providing service, which includes the cost of roaming on other providers' networks. Even if it were possible for WCX to limit its customers to single band devices that would, in theory, lock WCX into a single roaming partner without the possibility of competition, I find no stated business rationale in the *Amended Complaint* or associated exhibits that would explain why WCX would wish to place itself in that position. In reality, aside from WCX's unsubstantiated claim, there does not appear to be any evidence that AT&T is the only roaming partner available to WCX.

43. It is my understanding that LTE is a communications standard that is largely agnostic to what spectrum a device may be able to use. Therefore, if WCX chooses a multi-band device, it can have access to a number of national and regional roaming providers. In the U.S., LTE networks are being built out across a number of licensed spectrum bands, including 700 MHz (blocks A,B,C), 800 MHz, 850 MHz, 1700 MHz (blocks A,B,C,D,E,F), 1900 MHz, and 2500 MHz. WCX claims that it is building in Band 17 (Lower 700 MHz B), one of the bands in which AT&T has deployed LTE in adjacent CMAs. However, today's handsets and equipment do not limit themselves to a single band. Consequently, the fact that WCX has licensed 700 B and chosen to build out its own network on Band 17 in no way limits its roaming partners to AT&T unless WCX chooses to limit its customers to devices that are only capable of receiving Band 17 (assuming any such single band devices even exist). As Mr.

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[58] *Data Roaming Order*, ¶ 86.

Michael Prise explains in his declaration, the major mobile wireless providers have deployed LTE in a variety of different bands, and all popular handsets today support multiple LTE bands.[59]

44. The options for 2G and 3G roaming can be more limited because different providers use different technologies. For example, Verizon, Sprint, and U.S. Cellular operate CDMA-based networks; AT&T and T-Mobile use GSM-based networks. However, WCX has stated that it is "solely LTE-based."[60] Therefore, WCX's end-user devices are not concerned with legacy 2G/3G voice and data compatibility.[61] While WCX insists that AT&T is a "must have," there are at least three other national facilities-based providers that offer LTE-based service in CMAs adjacent to WCX's service area.

45. In fact, WCX has given no basis for its claim that AT&T is a "must have" provider. The reference in the *Amended Complaint* to the *Mosa Declaration* specifically discusses 2G and 3G compatibility issues, not LTE, and refers to "'must-have' providers *like* AT&T."[62] In this case, Verizon, T-Mobile, and Sprint provide LTE services in Austin, Houston, San Antonio, and throughout the U.S.[63]

46. I also have analyzed the actions of other carriers in the marketplace. For example, Sprint and rural providers have reached strategic agreements to accelerate the deployment of LTE networks. Under these agreements, Sprint works with rural providers to build out their LTE networks and, in return, Sprint and these rural providers are permitted to roam on each other's LTE networks.[64] These LTE agreements currently cover a population of 34 million in 23 states and rural carries can choose to roam on different LTE bands according to the devices they choose.[65] Verizon has implemented a

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59 Declaration of Michael Prise, November 5, 2014.

60 *Amended Complaint*, ¶ 6.

61 WCX has submitted the Declaration of Dirk Mosa in the T-Mobile proceeding. Mr. Mosa argues that the availability of 4G/LTE roaming will not negate the need for 2G and 3G roaming because carriers deploying LTE still typically require their customers to use 2G or 3G when making voice calls and LTE handsets will continue to have to revert to 2G/3G technology for voice calls and data when the LTE signal is too weak. *See* Declaration of Dirk Mosa, May 22, 2014 (available in *Complaint*, at 84-91) (hereinafter, *Mosa Declaration*), ¶ 22.

62 *Mosa Declaration*, ¶¶ 13-14 (*emphasis added*). *See also Amended Complaint*, n. 19.

63 *See* Verizon 4G LTE Coverage, http://s7.vzw.com/is/content/VerizonWireless/eCatalogs/Verizon-XLTE-markets.pdf; T-Mobile 4G LTE Coverage, http://t-mobile-coverage.t-mobile.com/4gcitylist.aspx; and Sprint LTE Data Coverage, http://coverage.sprint.com/IMPACT.jsp?ECID=vanity:coverage (*accessed* October 28, 2014).

64 NetAmerica Alliance, "SMART Delivers the Future to Rural America," http://www.netamericaalliance.com/smart; and Business Wire, "Sprint, Competitive Carriers Association and NetAmerica Alliance Join Forces to Accelerate Deployment and Utilization of 4G LTE across the United States," March 27, 2014, http://www.businesswire.com/news/home/20140327005320/en#.VEWC2fnF9qM (*accessed* October 20, 2014).

65 *See* Sprint, Press Release, "Rural Roaming Preferred Program Accelerates Deployment and Utilization of 4G LTE in Underserved Areas Across the U.S." June 16, 2014, http://newsroom.sprint.com/news-releases/sprint-to-expand-4g-lte-roaming-through-12-newagreements-with-carriers-covering-a-

similar program with rural providers, which includes reciprocal roaming rights.[66] Through this program, rural carriers lease spectrum from Verizon and build and operate their own LTE networks. These companies can then roam on Verizon's LTE network, as well as on the networks of all the other rural participants. WCX has not mentioned any attempt to reach roaming agreements with other carriers or participate in broader arrangements such as Sprint's and Verizon's programs.[67]

47. In conclusion, I find no technological constraint that would limit WCX to AT&T as the only possible roaming partner. My own investigation is also consistent with the declaration of Mr. Prise, a technical expert, who has reached the same conclusions.

B. AT&T's proposed rates are market based and consistent with the Commission's *Data Roaming Order*

48. In order to assess whether the data roaming rates proposed by AT&T are commercially reasonable, I analyzed the data roaming agreements that have been executed between AT&T and other domestic providers.[68] Economics shows that arm's length agreements meet a standard that both parties found to be in their mutual self-interest, and the Commission has adopted such a standard for commercial reasonableness.[69] As such, one can analyze existing data roaming agreements between AT&T and other providers to assess whether the rates in those agreements are consistent with the rates that AT&T proposed to WCX.

49. In my analysis, I focused on 35 data roaming agreements that resulted from arm's length negotiations between AT&T and other domestic providers, 25 of which were negotiated or amended after the *Data Roaming Order*. For this purpose, I excluded "strategic" agreements that involve roaming as well as other components not directly related to roaming.[70] This is the case, for example, when the agreement also involves a spectrum lease or a commitment to build network assets for AT&T and, as a result, the roaming rates are affected by the various agreements between the

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population-of-over-34-million.htm; and FierceWireless, "Sprint to add 700 MHz Band 12 capabilities to some new devices starting next year," March 26, 2014, http://www.fiercewireless.com/story/sprint-add-700-mhz-band-12-capabilities-some-new-devices-starting-next-year/2014-03-26 (*accessed* October 29, 2014).

66 *See* Verizon Wireless, "LTE in Rural America Continues to Grow," May 30, 2014, http://www.verizonwireless.com/news/article/2014/05/lte-rural-america-continues-to-grow.html (*accessed* October 15, 2014). *See* also *FCC Sixteenth Competition Report*, ¶ 395.

67 As discussed above, there are also hybrid models in which a facilities-based provider relies on MVNO agreements with other carriers to sell mobile service outside is service area. This is another option available to WCX.

68 One of the factors the Commission considers in in determining the reasonableness of the terms and conditions of a data roaming offer is whether "the providers involved have had previous data roaming arrangements with similar terms." *Data Roaming Order*, ¶ 86.

69 *Id.*, ¶ 81.

70 *See* Table B-4 in Appendix B for a list of the excluded strategic agreements.

parties.[71] I also focused on the effective rates paid or charged by AT&T for data roaming in 2014 (January to August) to capture roaming rates under current market conditions – as opposed to rates paid in previous years.[72]

50. Although AT&T and other national wireless carriers began building out their LTE networks several years ago, other wireless providers have only recently done so, and LTE roaming arrangements are a relatively recent phenomenon. It is my understanding that eight of AT&T's current roaming agreements specify rates for LTE-based data roaming, three of which are strategic agreements (which involve a spectrum lease agreement). In each of the arm's length, non-strategic agreements, the LTE roaming rate is [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL], which is exactly the rate AT&T offered to WCX. (*See* Table B-1 in Appendix B.)

51. I also analyzed the roaming rates effectively paid and charged by AT&T in all its current roaming agreements. (*See* Table B-2.) There is a wide variation in data roaming rates across AT&T's agreements with other providers. In addition, several agreements specify tiered rates that decrease as the volume of data increases. I conservatively calculated the *average* data roaming rates in 2014. Given that, as of July 2014, WCX had less than 500 retail subscribers, it is likely that the highest tier rate under these agreements would apply to WCX.[73] In addition, roaming rates paid and charged by AT&T tend to be higher in agreements that involve small data volumes. Consequently, my calculations tend to understate the rates that WCX would pay under agreements that AT&T has executed with similar providers.

52. The data roaming rate AT&T proposed to WCX [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] is well below the average data roaming rates effectively paid and charged by AT&T in agreements with other providers during January 2014 to August 2014.[74] The weighted average effective roaming rate during this period was [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[75] Overall, AT&T is a net purchaser of roaming as it relies more on roaming on other networks, typically in rural regions. The rate proposed to WCX is also well below the weighted average effective rate *paid* by AT&T for roaming on other providers' networks, approximately

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71 *See* Table B-4. In addition to limiting the analysis to agreements that resulted from arm's length negotiations, my approach is consistent with WCX's proposed *RWA Model Agreement,* which acknowledges that roaming rates can vary where "one Party was incented to build-out network for the benefit of the other Party." *See RWA Model Agreement*, Exhibit 2.

72 Thirty-one of these 35 roaming agreements had actual data roaming traffic during January 2014 to August 2014.

73 *See* Email from Lowell Feldman to George Meadors, July 29, 2014 (also available in *Complaint*, 414-416, at 415).

74 Only one agreement in Table B-2 has an effective roaming rate below [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] (*see* Table B-4).

75 Since LTE agreements are a more recent phenomenon, as more rural carriers develop LTE networks one could expect the average effective rates for roaming (which include 2G and 3G-based roaming) to converge to the level of LTE-based rates.

[BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]. (The weighted average rate charged by AT&T for other operators' roaming on AT&T's network was [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]. *See* Table B-2.)[76]

53. The rate AT&T proposed to WCX is also well below the average effective rate in agreements AT&T has negotiated since the *Data Roaming Order*. Since the *Data Roaming Order* (from April 2011), AT&T has executed or amended 25 roaming agreements, with an average roaming rate of approximately [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]. (The rate proposed to WCX is also well below the average effective rate in agreements AT&T has negotiated in last year or two.)

54. I also reviewed the T-Mobile data roaming rates reported to the Commission by Dr. Farrell.[77] Dr. Farrell shows the average data roaming rate T-Mobile has paid for wholesale domestic data roaming during the 2008-2013 period, and T-Mobile's forecast of the average rate it expected to pay in 2014 (as of January 2014). Dr. Farrell estimated that T-Mobile paid an average data roaming rate of $0.30 per MB in 2013. For 2014, T-Mobile forecasted an average rate of $0.18 per MB.[78] Although I have not received access to T-Mobile's data, Dr. Farrell estimates are in line with my finding that the LTE roaming rate in the *AT&T Proposed Agreement* is below the effective roaming rates other carriers have negotiated on an arm's length basis.

C. AT&T's proposed usage and resale restrictions are consistent with the Commission's policy objectives and AT&T's agreements with other providers

55. The usage and resale provisions proposed to WCX in the *AT&T Proposed Agreement* are consistent with agreements executed between AT&T and other providers. They are also consistent with the Commission's goals of (i) making roaming available to local customers who travel outside their home service area, (ii) safeguarding against congestion and preventing harm to the host provider's network, and (iii) ensuring that roaming is not employed as a backdoor way to resell data services.[79]

56. As discussed above, the Commission noted that backdoor resale would reduce incentives of facilities-based providers to build-out and upgrade their services. Rates determined in arm's length negotiations prevent facilities-based providers from becoming *de facto* MVNO's by free-riding on roaming rates in regions in which investments costs are high.

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[76] AT&T makes additional adjustments and audits to these data to incorporate, for example, rate caps and the tiered structure of some roaming agreements. Although the adjusted data are not available at the provider level, I confirmed that the aggregate data volume and charges do not change significantly after these adjustments.

[77] *Farrell Declaration*, § VI.D.

[78] *Id.*, ¶ 86 and Table 6.

[79] *See, e.g., Data Roaming Order*, ¶¶ 1, 34, 52.

57. Free-riding is a well-established phenomenon in economics describing a third party who benefits from resources, goods, and/or services without having to pay for them.[80] In this particular case, WCX wishes to take advantage of the investments AT&T has made in WCX's own license area and nationwide.

58. The *AT&T Proposed Agreement,* like AT&T's roaming agreements with other providers, contains provisions that ensure that the parties do not offer wholesale or retail services that are primarily designed to operate on the other party's network (*i.e.*, a resale). Standard provisions in AT&T's agreements prevent the parties from extending the terms of the agreement to MVNOs or other resellers,[81] and [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[82]

59. In terms of usage restrictions, while every agreement may have individual elements that vary from AT&T's template, the usage restrictions in the agreement offered to WCX are no more burdensome than agreements already signed by AT&T and are part of its current template roaming agreement.

60. AT&T's current template agreement [BEGIN CONFIDENTIAL] [redacted]

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80 *See, e.g.,* Carlton, Dennis W., and Jeffrey M. Perloff, *Modern Industrial Organization*, 2005 (4th edition), at 414. This issue is of particular importance when discussing access to pre-existing networks by new entrants. For a discussion on free-riding in the context of internet backbones by smaller rural providers, *see* Rob Frieden, "Without Public Peer: The Potential Regulatory and Universal Service Consequences of Internet Balkanization," *Virginia Journal of Law and Technology Association*, Fall 1998; and Michael Kende, "The Digital Handshake: Connecting Internet Backbones", *Commlaw Conspectus*, No. 11, 2003. For a general discussion of pricing issues related to access to physical communication networks, *see* Spulber, Daniel F., and Christopher Yoo, "Access to Networks: Economics and Constitutional Connections," *Cornell Law Review*, No. 88:4, 2003 (hereinafter, *Spulber and Yoo*).

81 *See AT&T Template Agreement*, § 11: [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] *See also* Table B-4.

82 *See AT&T Template Agreement,* § 11: [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] *See also* Table B-4.

83 [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] *AT&T Template Agreement*, § 11. *See also* n. 49 above.

[END CONFIDENTIAL].

61. These restrictions are also placed on AT&T by *its* roaming partners and AT&T has found those restrictions to be commercially reasonable when applied to AT&T.[85] For example, [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]. (*See* Tables B-2 and B-3.)

62. Finally, I should note that the AT&T proposal only imposes usage restrictions on the share of WCX's traffic volume that roams on *AT&T's network*. As discussed above, WCX is not limited to a single roaming partner and, given the availability of multi-band wireless devices, WCX can roam on multiple networks, just as AT&T and other carriers do. Consequently, AT&T's proposed roaming restriction of [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]

D. WCX's objections to other terms proposed by AT&T are misplaced

63. AT&T's agreements with other providers allow the parties to [BEGIN CONFIDENTIAL] suspend the service or give priority to their own customers when required due to congestion or other technical

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84 [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] *See AT&T 2011 Template Agreement*, § 11.

85 AT&T is a net buyer of roaming in many of these agreements and overall. As a result, AT&T's terms and conditions for end-user wireless service parallel those that roaming partners have imposed on AT&T. [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] *See* AT&T's Wireless Customer Agreement, § 4.5.2, http://www.att.com/shop/en/legalterms.html?toskey=wirelessCustomerAgreement (*accessed* October 13, 2014).

86 *See* Table B-4.

[END CONFIDENTIAL].[87] The Commission has noted that these provisions are already a feature of many commercially negotiated agreements.[88] WCX proposes to impose additional limitations on AT&T's ability to monitor and manage network traffic that go beyond the provisions in existing roaming agreements and are contrary to the *Data Roaming Order*. WCX contends, for example, that there should be no traffic management by AT&T of any sort, other than application-neutral network management practices during times of cell site congestion, and in a manner that does not disfavor WCX's users relative to AT&T's own retail users.[89]

64. Prices for data services in a mobile network reflect not only costs of providing a fixed amount of bandwidth to a population of consumers, but also serve the purpose of managing congestion and guiding potential investments to increase the supply of that bandwidth. If the price of data services is too low, it will be over-utilized by consumers, cause congestion, and reduce the quality of the user experience for that carrier. In addition, rates that do not take congestion into account will provide insufficient incentives to improve the network.

65. In an arm's length negotiation, it doesn't make economic sense for the host carrier potentially to reduce the quality of the service provided to its own retail customers, thereby damaging its brand, in order to provide roaming services to another carrier's subscribers—unless the requesting carrier is willing to pay a rate that takes these issues into account. When priced correctly, roaming rates should reflect the potential for congestion, but even then, if there are periods of time when a given cell site becomes congested, any reasonable market-based agreement would recognize the right of the host carrier to give priority to its own customers.

66. Another term disputed by WCX is whether AT&T should be allowed to [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]. WCX does not believe that the roaming agreement should have any audit terms.[90] The audit provision is a mechanism to confirm that contractual provisions are being followed and is common in AT&T's agreements with other providers.[91] For example, AT&T needs to have a mechanism to verify that WCX's roaming, as percentage of its total traffic volume, does not exceed the threshold agreed upon in the usage provision. This requires information on the total data usage of WCX's subscribers, which is not available to AT&T.[92] As a general matter, audit provisions are designed to avoid the expense and disruptions caused by litigation and are all the more reasonable here considering that there is a

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87 *See, e.g., AT&T Template Agreement*, § 17; and Table B-4.

88 *Data Roaming Order,* ¶ 52 and n. 148.

89 *See Amended Complaint*, ¶¶ 62, 88-89. *See also RWA Model Agreement*, § 5.

90 *Amended Complaint*, ¶¶ 76-77.

91 *See* Table B-4.

92 The *AT&T Proposed Agreement* also [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]. *See AT&T Proposed Agreement*, § 11.c.

history of disputes between Mr. Feldman's companies and AT&T, which have resulted in years of litigation.[93]

VI. WCX's Proposed Agreement Is Not Commercially Reasonable

67. WCX proposes to use the *RWA Model Agreement* as the contract terms between WCX and AT&T for approval in this proceeding.[94] As noted by Mr. Feldman, the proposed *RWA Model Agreement* is the product of his work within a trade organization that represents a select group of rural wireless carriers.[95] However, there is no evidence that this agreement template has been used to reach a single agreement with another wireless carrier.[96] Since the proposed template has not been road tested, there is no assurance that it can adequately address the problems that might arise in the roaming context.

68. Through the use of the *RWA Model Agreement*, WCX proposes, among other terms, the following terms and conditions:

- *Rates*: WCX proposes a rate of $0.0096 per megabyte (MB) of data, for all usage, as the commercially reasonable data roaming rate.[97] According to WCX, this rate is based on the RWA's estimate of "industry-average and AT&T Mobility's" *retail* rates.[98]
- *Usage and Resale*: WCX proposes to "endeavor" to restrict usage to no more than 50 percent of the total usage of all WCX accounts, with no usage restrictions to individual accounts and no specified penalty or provision in the event of violation of the usage restriction.[99] In addition, WCX proposes that Machine-to-Machine ("M2M") and "Internet of Things" services and applications should never be considered part of the "Permanent Roamer" pool.[100] Furthermore, the *RWA Model Agreement* allows WCX to act as a wholesaler and resell its services to MVNOs.[101]

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93 *See Meadors Decl*., § VI.

94 *See Amended Complaint*, ¶¶ 31, 44.

95 *See Feldman Declaration*, ¶ 12. The RWA "is a trade association representing rural wireless carriers who each serve fewer than 100,000 subscribers." Rural Wireless Association, "About RWA," http://ruralwireless.org/about-rwa/ (*accessed* October 9, 2014).

96 Supplemental Declaration of Lowell Feldman, October 1, 2014 (hereinafter, *Feldman Supp. Decl.*), ¶ 14.

97 *Amended Complaint*, ¶ 64; *RWA Model Agreement*, §§ 3, 8, Exhibit 1 (Definition of Data Roaming), and Exhibit 2.

98 *Amended Complaint*, ¶ 64. *See also RWA Model Agreement*, Exhibit 2.

99 *Amended Complaint*, ¶ 51. *See also RWA Model Agreement*, § 5.

100 *Amended Complaint*, ¶ 51. *See also RWA Model Agreement*, § 5. The *RWA Model Agreement* does not include any provisions related to "Permanent Roamers."

101 *Amended Complaint*, ¶ 80. *See also RWA Model Agreement*, § 5.

- *Monitoring Traffic and Congestion*: WCX proposes "no packet inspection, throttling, or manipulation by AT&T Mobility of any sort, other than application-neutral reasonable network management practices during times where cell site locations are congested."[102] When cell site locations are congested, the *RWA Model Agreement* prevents the host carrier from disfavoring data roaming relative to its own users.[103]
- *Auditing*: WCX does not propose any audit terms and states that no audits should be required because its proposed usage restriction would be "simple and easy to administer and verify."[104]
- *Termination*: The proposed *RWA Model Agreement* is set to continue in perpetuity and cannot be terminated by a single party, unless the other party is in material breach or has its license revoked, data roaming becomes technically impracticable, or there is an unacceptable level of unauthorized use.[105]

69. As discussed in more detail below, WCX's proposal is not consistent with the Commission's *Data Roaming Order* and does not contain commercially reasonable terms and conditions.

A. The analyses offered by WCX's expert Dr. Roetter are flawed and disconnected from the Commission's *Data Roaming Order*

70. WCX's expert Dr. Roetter argues that the *RWA Model Agreement* is commercially reasonable. According to Dr. Roetter, his analysis is based on five factors:[106]

- The terms and conditions of the *RWA Model Agreement* are permissive and necessary for market entry.
- Do not impose any material constraints on AT&T while allowing a reasonable profit margin.
- Include safeguards against arbitrage by requiring WCX to handle the majority of its customers' traffic.
- Prevent either party from imposing irreparable harm to the other party.

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102 *Amended Complaint*, ¶¶ 62, 88-89. *See also RWA Model Agreement*, § 5.

103 *RWA Model Agreement*, § 5.

104 *Amended Complaint*, ¶¶ 76-77.

105 *RWA Model Agreement*, §§ 2, 13.

106 *See* Declaration of Martyn Roetter, September 8, 2014 (hereinafter, *Roetter Public Decl.*), at 158. I do not address every argument in Dr. Roetter's declarations as many of them are unsupported or based on evidence irrelevant to this case. For example, Dr. Roetter discusses Canadian and European retail and roaming rates, which are irrelevant because they are based on different jurisdictions with different regulatory schemes. *See, e.g.,* Opposition of AT&T, *In the Matter of Petition For Expedited Declaratory Ruling Filed By T-Mobile USA, Inc. Regarding Data Roaming Obligations*, WT Docket No. 05-265, July 10, 2014, at 30-31 (discussing the European use of cap pricing and differences between the U.S. and European regulation).

- Are consistent with the terms and conditions in roaming agreements between other operators.

71. Some of the factors analyzed by Dr. Roetter are disconnected or even inconsistent with the Commission's *Data Roaming Order*. For example, as discussed in more detail in Section VI.B.1, the Commission does not consider in the context of assessing commercially reasonable rates (nor would it make sense to consider in this context) whether the host provider obtains a "reasonable profit margin." Other factors in Dr. Roetter's Declaration, even if relevant, are based on flawed analyses or no analysis at all of the facts in this case.

72. As discussed in Section VI.D, some of the terms in the *RWA Model Agreement* do impose "material constraints" on AT&T's freedom of action and go well beyond any signed agreement between AT&T and other providers of data services. For example, the *RWA Model Agreement* prevents AT&T from disfavoring data roaming relative to its own users when cell site locations are congested. It also contains the odd provision that the roaming agreement is set to continue in "perpetuity" and cannot be terminated by a single party.

73. In terms of "arbitrage," I show in Section VI.C that the terms proposed by WCX, including the ability to roam on AT&T's network at retail prices and then resell the service, far exceed what is needed to accommodate legitimate roaming and, from an economic standpoint, equate roaming with resale. Moreover, it is unclear how the *RWA Model Agreement* would be effective in preventing "arbitrage" because it sets only an aspirational limit on the amount of roaming, does not establish any audit process for the parties to verify the level of usage, and does not specify any penalty in the event of a violation of the usage restrictions.

74. Dr. Roetter's claim that the terms and conditions of the *RWA Model Agreement* are necessary for market entry is also unsupported. First, Dr. Roetter has not performed any reliable analysis to show that roaming rates need to be at or below retail rates in order to allow for market entry (or to avoid consumer harm). And, as the dozens of agreements negotiated at considerably higher rates confirm, rates at the levels proposed by WCX are not necessary for market success. As discussed in VI.B.1, the only analysis presented by Dr. Roetter attempts to show that the retail rates in the *RWA Model Agreement* are higher than the costs incurred by AT&T in providing roaming service. Second, the Commission does not require, and it would be bad policy, to set roaming rates at some level deemed necessary to facilitate entry by a provider, even if such a provider intends to rely on other providers' networks. Instead, the Commission sought to balance the core policy goal of widespread availability of data roaming with the need to provide proper incentives to encourage facilities-based investment (for both requesting and host providers).

75. The last factor in Dr. Roetter's list (*i.e.*, whether the *RWA Model Agreement* is consistent with terms and conditions in roaming agreements between other operators) is indeed a relevant factor to consider. However, other than listing this factor, Dr. Roetter's Declaration does not present a single

piece of evidence or example of a roaming agreement consistent with the terms and conditions (and, in particular, the rates) of the *RWA Model Agreement*.[107]

B. The data roaming rates proposed by WCX are not consistent with the Commission's *Data Roaming Order* and not commercially reasonable

76. WCX's proposed data roaming rates explicitly guarantee WCX the use of AT&T's network through data roaming at levels that WCX equates to *retail prices*.[108] These rates are not consistent with Commission's commercially reasonable standard and do not make economic sense.[109]

77. As an initial matter, WCX acknowledges that the Commission has already rejected proposals to benchmark roaming rates to retail rates.[110] In the *Voice Roaming Order* of 2007, the Commission rejected the use of benchmarks based on retail rates (or price caps or any form of prescriptive rate regulation) for common carrier regulation of voice roaming.[111] The Commission declined again to impose prescriptive rate regulation in the *Data Roaming Order*.[112] In fact, the Commission expected commercially reasonable data roaming rates to exceed retail rates. In eliminating the home roaming exclusion for interconnected voice and data, the Commission found that "the relatively high price of roaming" would preserve investment incentives.[113] The Commission reiterated this logic in the *Data Roaming Order.*[114]

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107 Similarly, in a separate declaration, Dr. Roetter argues that AT&T's proposal is not commercially reasonable in comparison with "other roaming agreements in which AT&T is involved," as well as with agreements between "other pairs of roaming partners." *See* Confidential Declaration of Martyn Roetter, September 8, 2014 (hereinafter, *Roetter Non-Public Decl.*), at 188. The only reference to another roaming agreement provided by Dr. Roetter is the AT&T/Leap Wireless roaming agreement, which Dr. Roetter admits was never consummated and which was negotiated as a payment to Leap (as part of the break-up fee) in a merger transaction and is thus not representative of an arm's length commercial roaming agreement. Furthermore, since Dr. Roetter does not know the terms of the AT&T/Leap Wireless roaming agreement, he takes no position as to its reasonableness. *See Roetter Non-Public Decl.*, at 191-192. Dr. Roetter does not present any additional evidence regarding roaming agreements (either between WCX/AT&T and other providers or between "other pairs of roaming partners").

108 *Amended Complaint*, ¶ 11.

109 I also show in Section VI.B.2 that the RWA proposed rates do not properly reflect retail rates and are not directly comparable to roaming rates.

110 *Amended Complaint*, ¶ 66.

111 *Voice Roaming Order*, ¶¶ 36-37. The Commission also noted that rate caps based on retail rates may give large and small carriers' incentives to reduce discounts or raise rates for retail service. *See Voice Roaming Order*, ¶ 39.

112 *Data Roaming Order*, ¶¶ 21, 51.

113 Order on Reconsideration and Second Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, April 21, 2010 (hereinafter, *Voice Roaming Order on Reconsideration*), ¶ 32.

114 *Data Roaming Order,* ¶ 21.

78. Second, the "retail" roaming rates that WCX proposes are far outside the range of commercially negotiated rates that are presumptively commercially reasonable. As described in Section V.B, I reviewed the 35 data roaming agreements that resulted from arm's length negotiations between AT&T and other domestic providers (25 of which were negotiated after the *Data Roaming Order*).

79. It is my understanding that the five arm's length LTE data roaming agreements executed by AT&T include rates of [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]. (*See* Table B-1.) Consequently, the rate proposed by WCX as "commercially reasonable" ($0.0096 per MB) is [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] of the LTE rate that resulted from any arm's length negotiation between AT&T and other providers.

80. I also calculated the average roaming rates effectively paid and charged by AT&T in all its current roaming agreements. (*See* Table B-2.) As discussed above, my calculation of average effective data roaming rates is conservative because, to the extent that some of AT&T's agreements with other providers include tiered rates, and larger volumes of data, WCX's low data volume would place it in the highest rate tiers.

81. The rate proposed by WCX is [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] of the average effective rate that resulted from AT&T's arm's length negotiations with other providers. The WCX's proposed roaming rate is also far below the roaming rates paid by AT&T to other providers and the roaming rates in agreements AT&T has negotiated since the *Data Roaming Order*. In no case has AT&T negotiated on an arm's length basis [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[115] (*See* Section V.B above.)

82. The above shows that WCX's proposed rates are far below the range of market-based rates that AT&T has negotiated with other providers. WCX's proposed rates are also well below the rates T-Mobile has paid for data roaming, as reported by Dr. Farrell. (*See* Section V.B. above.)

83. Third, WCX's rate proposal is fundamentally inconsistent with the investment incentives the Commission sought to preserve with its commercial reasonableness standard. Here, it is important to note that the *RWA Model Agreement* proposed by WCX would guarantee WCX its measure of retail rates in *perpetuity*, as it cannot be terminated unilaterally by AT&T.[116] Moreover, the *RWA Model Agreement* states that the benchmark rate (*i.e.*, the "prevailing industry retail rate") may be revisited as industry retail rates decrease, but does not provide any specific mechanism for revising

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[115] AT&T has only negotiated roaming rates below [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] in strategic agreements with other providers. As discussed above, the roaming rates in these agreements are affected by other contract components (*e.g.*, spectrum lease).

[116] *See RWA Model Agreement*, §§ 2, 13.

the rates in the future.[117] In other words, the *RWA Model Agreement* calls for prescriptive rate regulation.[118]

84. From an economic perspective, one of the consequences of rate regulation is the danger of reducing dynamic efficiency by requiring access at rates below what would occur in an arm's length negotiation. While this may allow for an additional competitor to access existing facilities, the requirement to share facilities at such rates reduces the incentive for the potential competitor to invest in the relevant input for itself. As a further result, it can entrench an existing competitor by forestalling the emergence of alternative network technologies. This effect is particularly problematic in technologically dynamic industries, where firms have the ability to develop new ways either to circumvent or to compete directly with existing networks.[119]

85. WCX proposes to pay for roaming based on what it claims are *average* industry retail rates. Average rates reflect a combination of rates for high and low cost areas (*e.g.*, rural and urban areas) for existing retail customers. They do not reflect the marginal opportunity cost of supplying incremental bandwidth. As such, a requesting carrier that pays for roaming based on the average price of the service may not cover the incremental cost that the host provider faces, including the potential for congestion and the opportunity cost of providing the service to another carrier. As a result, roaming rates based on a measure of average retail prices may force host providers to make investments with negative returns and would discourage investments in high cost and congested areas.

86. Another perverse economic incentive of regulating roaming rates based on retail rates is that it may give wireless carriers incentives to raise retail rates. If the regulated rates are below the rates that would result from market-based negotiations, and in order to protect their network investments from free-riding, host carriers may find it profitable to raise their retail rates thereby increasing the benchmark used to regulate roaming rates.[120] The regulation would not only harm consumers by

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117 *RWA Model Agreement*, Exhibit 2. The *RWA Model Agreement* does not specify the source data for its estimated retail rate of $0.0096 per MB.

118 The *RWA Model Agreement* "calls for the inter-carrier data roaming rates to be *at or below* the prevailing retail data rate." *See* Comments of Rural Wireless Association, Inc., *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, July 10, 2014 (hereinafter, *RWA Comments*), at 9 (*emphasis in original*). Indeed, according to the RWA, "*any* difference" between data roaming rates and, for example, "the retail data rate the must-have carrier or requesting carrier charges its retail customers" or resale rates to MVNOs, is *per se* commercially unreasonable. *Id.*, at 8 (*emphasis in original*).

119 *See, e.g., Spulber and Yoo*, at 989, 1018-1021.

120 If one assumes that without rate regulation retail prices are set at the level that maximizes a carrier's profits, a small increase in price would only have a second-order effect on profitability (the first-order effect is zero at the optimal price). However, once roaming rates are regulated based on the carrier's retail rates (and below market-based rates), the carrier has a first-order incentive to implement at least a small price increase in retail rates because by doing so it increases the profit it obtains from roaming traffic on its network (without reducing profits on retail sales). Although AT&T as a net buyer of data

discouraging investments in facilities-based service, but also by providing an incentive to increase the price of the retail service.[121]

87. Similarly, benchmarks based on MVNO resale rates,[122] distort investment and pricing incentives. As in the case of benchmarks based on retail rates, a benchmark based on resale rates creates the incentive for requesting providers to under-invest in new infrastructure (by allowing for *de facto* resale) and may give carriers an incentive to raise resale rates. In addition, a benchmark based on resale rates would require the Commission or a third party to collect information from confidential contracts in order to implement some form of rate regulation.[123]

1. WCX's arguments that retail rate-based roaming rates are necessary for WCX's services to be sustainable are flawed

88. WCX claims that in order for WCX's services to be sustainable, charges for significant use of roaming must not exceed AT&T's retail rates.[124] WCX does not present any analysis to show that any data roaming rate above retail rates would make WCX unsustainable, nor does it present any analysis to show that data roaming rates at or below retail rates are necessary to achieve widespread availability of competitive wireless services, or that such rates would ensure proper incentives for facilities-based investments.

89. As I discussed in Section V.B, AT&T (as well as T-Mobile)[125] has dozens of data roaming agreements at commercially reasonable rates (above retail rates) with rural and small providers – and there is no evidence that such rates make these providers' services unsustainable. Further, rural carriers that have signed agreements with AT&T (and T-Mobile), at much higher roaming rates than what WCX proposes here, have continued to invest in upgrading their networks and in expanding the services they offer to their customers.[126]

90. WCX also claims, incorrectly, that the "Public Roetter Declaration demonstrates that roaming prices exceeding the prevailing retail data rate [are] harming and will harm rural consumers."[127] However,

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roaming may not have this incentive (depending on how rates are regulated), the above highlights one of the potential unintended consequences of rate regulation.

121 The RWA's suggestion that roaming rates must not exceed the retail rates charged by the *requesting carrier* can further open the door for requesting carriers to distort their own retail rates to obtain roaming at below market prices. *See RWA Comments,* at 7.

122 *Id.*, at 7-8.

123 The Commission has stated that it is not possible to track resale rates in a comprehensive manner. *See FCC Sixteenth Competition Report*, ¶ 272.

124 *Feldman Supp. Decl.*, ¶ 6.

125 *See Farrell Declaration*, § VI.D.

126 *See, e.g., FCC Sixteenth Competition Report*, ¶¶ 392, 402.

127 *Amended Complaint*, ¶ 67.

Dr. Roetter makes a different claim in his Declaration. He claims that unless rural carriers can obtain reasonable roaming services, they would find it difficult to obtain adequate funding (and also claims that AT&T proposed rates well above retail rates will discourage rural carriers' investments).[128]

91. Dr. Roetter has not performed any reliable analysis to show that roaming rates exceeding retail rates would harm consumers. In fact, the only analysis presented by Dr. Roetter attempts to show that the retail rates in the *RWA Model Agreement* are higher than the *costs* incurred by AT&T in providing roaming service.[129]

92. Dr. Roetter's analysis of costs is misguided and largely irrelevant to the assessment of commercially reasonable rates, for several reasons. First, incentives are driven by profit margins (*i.e.*, price minus cost). In order for rates to provide incentives to invest in new and upgraded facilities, rates must be higher than costs (including the recovery of capital costs). Second, as noted above, market-based rates also serve to manage congestion and guide investments to ensure sufficient supply in high-cost areas. Rates based on some measure of *average* costs are likely to result in insufficient investment (and congestion) in areas in which population density and other factors result in higher *marginal costs* (relative to average rates).

93. Third, in network industries, market-based rates also reflect opportunity costs. AT&T may be able to offer its limited bandwidth to another carrier or use it to provide additional services to its own customers. Even if the bandwidth does not appear to be fully utilized, AT&T may preserve it to enhance network reliability and as insurance against future growth or peaks in demand.[130] It would be bad economic policy to force AT&T to offer service to WCX just because WCX is willing to cover some measure of "cost." An efficient allocation of economic resources occurs when the prices developed in the marketplace through commercial negotiation reflect the best use of scarce resources.

94. Dr. Roetter also ignores that the Commission has refused to cap roaming rates based on a benchmark – regardless of whether the benchmark is based on retail rates or providers' costs.[131] Dr.

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128 *Roetter Public Decl.*, at 164.

129 *Roetter Public Decl.*, at 166-167, 172-175. WCX has previously proposed data roaming rates based on cost benchmarks. [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] *See* Letter from Matthew A. Henry, Counsel for WCX, to Lisa Saks and Lisa Boehley, Federal Communications Commission, Nov. 21, 2011, at 11, 22 (also available in *Complaint*, at 642, 653).

130 For a discussion of excess capacity, opportunity costs, and "lumpy" investments in network industries, *see, e.g., Spulber and Yoo*, at 912-914. Spulber and Yoo explain that "what appears to be excess capacity imposes real costs by hastening the need for additional capacity." *Id.*, at 913.

131 The Commission does not mention the host provider's costs among the factors it may consider in the assessment of whether a particular data roaming offer is commercially reasonable (and does not generally mention the host provider's cost and profitability in the context of assessing commercially reasonable rates). *See Data Roaming Order*, ¶ 86. To the contrary, the Commission's finding that "the relatively high

Roetter's misguided analysis appears to be rooted in his assumption that the Commission's concerns that benchmarking or capping rates would reduce investment incentives "no longer apply."[132] Dr. Roetter does not explain why the Commission's concern regarding investment incentives for both small and large carriers no longer apply. His analysis of costs and profitability ignores the importance of investment incentives and, as a result, incorrectly concludes that roaming rates are commercially reasonable as long as the host provider can cover its costs.[133]

2. Even if retail rates were relevant, WCX's proposed rate does not properly reflect retail data rates

95. For the reasons discussed above, I do not find that WCX's proposed data roaming rate based on a benchmark of retail rates is reasonable. In addition, WCX's proposed retail rate does not properly reflect current retail rates for data services.

96. I have reviewed the *Farrell Declaration* from the T-Mobile case, submitted with WCX's *Complaint*.[134] Dr. Farrell explains that because retail pricing is somewhat complex and nonlinear, some analysis is required in order to translate retail offers into per-MB retail prices for mobile data. Because of this and other limitations, Dr. Farrell does not suggest "that strong conclusions can be drawn" based on a benchmark of retail rates.[135] Dr. Farrell mentions several considerations that are necessary when analyzing retail rates:[136]

- Retail plans are not data-only; they typically include voice, text, and other services;
- Retail plans typically include a fixed monthly charge and overage charges that apply if the subscriber exceeds her monthly data allowance;
- Retail data charges are "lumpy" in that each user is charged, for example, $15 for each additional GB of data *or part thereof* (as opposed to roaming rates, which WCX and AT&T propose to bill in 1KB increments);[137] and

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price of roaming compared to providing facilities-based service" would preserve investment incentives unambiguously reflects the understanding that roaming rates would be generally higher than costs. *See, e.g., Data Roaming Order*, ¶ 21.

132 *Roetter Public Decl.*, at 177 and n. 25 (citing *Voice Roaming Order*, ¶¶ 36-40).

133 I also note that Dr. Roetter's analysis of the "Financial Implications for AT&T" is based on an example from another carrier (Bell Mobility) and ignores investment costs. *See Roetter Public Decl.*, at 172-175. Although Dr. Roetter mentions "Capital investment" as a relevant cost (*see Id.*, at 173), the example from Bell Mobility's costs and the discussion that follows ignore this cost.

134 Mr. Feldman states that, in general, he agrees with and supports the statements, findings and conclusions reached by Dr. Ferrell. *Feldman Declaration*, ¶ 14.

135 *Farrell Declaration*, ¶ 60.

136 *Id.*, ¶¶ 64-69.

137 *See RWA Model Agreement*, Exhibit 4, § 2.3; and *AT&T Proposed Agreement,* Exhibit 8.

- The price that a retail user pays per MB of data usage depends both on data usage and the chosen plan. Because retail customers cannot perfectly predict their usage, it would be overly optimistic to rely on the lowest rates in the market.

97. To take these factors into consideration, Dr. Farrell calculates a "high estimate" of the average retail rates charged by AT&T, Verizon, Sprint, and T-Mobile as of February 2014.[138] The average retail price per MB decreases as usage increases. Dr. Farrell's calculations show that for low data usage (*e.g.*, 0.25 GB per month), retail customers would pay between $0.15 and $0.30 per MB. But when retail customers use 1 GB per month, they pay no more than $0.12 per MB. Finally, for the average usage of T-Mobile's customers, approximately 1.7 GB per month, Dr. Farrell calculates that retail customers pay between $0.03 and $0.08 per MB of data usage. None of these estimates are consistent with WCX's proposed "retail" rate of less than $0.01 per MB of data usage.

98. WCX's expert Dr. Roetter claims to provide information on retail rates for "incremental usage."[139] As noted in Dr. Farrell's discussion, these advertised rates ignore that consumers also pay monthly charges and that data usage charges are "lumpy," in the sense that the effective rate per MB paid, by each customer, is always higher that the advertised rate—unless the customer uses *exactly* the maximum amount of data allowed by the plan. By contrast, roaming rates are billed in 1 KB increments and WCX would pay for the aggregated traffic volume—rather than for buckets of data (*e.g.*, 1 GB per month) for each roaming customer.

99. In addition, there are numerous retail rates in the marketplace. The retail rates in Dr. Roetter's Declaration appear to be towards the lower end of the offers available from mobile carriers. (Although Dr. Roetter shows retail rates that in all cases are at or below $10 per GB, Dr. Farrell states that "in most cases," the overage charge is $15 per GB.[140])

100. For example, the retail rates cited by Dr. Roetter for AT&T's Mobile Share plans ($7.5-10/GB) appear to be limited to the monthly cost of family plans (which include at least 15 GB of data). For all plans with less than 10 GB of data, the retail price is always greater than $10/GB (for example, the monthly cost of the 1GB and 2GB plans is $25 and $40, respectively, in addition to access charges for each device in the plan).[141] Moreover, the overage charge in AT&T's Mobile Share plans is at least $15/GB.[142]

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138 *Farrell Declaration*, ¶¶ 67-69. Dr. Farrell allocates the entire monthly fee and overage charges to the data used.

139 *Roetter Public Decl.*, at 167-168.

140 *See Roetter Public Decl.*, at 167-168; Farrell Declaration, ¶ 66 and Table 1.

141 *See* AT&T Mobile Share Value Plans, http://www.att.com/shop/wireless/data-plans.html?#fbid=GoXGnMzYx4w (*accessed* October 20, 2014): "Additional data: "$20/300MB on 300MB plan, $20/500MB on 1GB plan, and $15/1GB on all other plans."

142 *Id.*

C. The usage and resale terms proposed by WCX are not consistent with Commission precedent or sound economic policy

101. The *RWA Model Agreement* only requires each party to "endeavor to provide the majority of its customers' mobile Data Services on its own Network."[143] As such, the proposed agreement permits WCX to place up to 50 percent of its traffic on AT&T's network.[144] In addition, the proposed agreement, (i) does not establish any audit process for the parties to verify the level of usage;[145] (ii) does not specify any penalty or provision in the event of violation of the usage restrictions;[146] (iii) does not impose any limits to specific customers or account-level usage;[147] and (iv) prevents AT&T from imposing any restrictions on WCX's resale of AT&T data services (including acting as a wholesaler) to customers entirely outside its home service area.[148]

102. The terms proposed by WCX, including the ability to resell services, far exceed what is needed to accommodate legitimate roaming. From an economic standpoint, the proposed terms equate

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For Verizon, Dr. Roetter cites retail rates of $5-10/GB based on prepaid plans. *Roetter Public Decl.*, at 167. But Verizon's overage charge for data is at least $15/GB. *See* Verizon, "Single Line Plans," http://www.verizonwireless.com/wcms/consumer/shop/shop-data-plans/single-line-data-plans.html; and Verizon, "The MORE Everything Plan," http://www.verizonwireless.com/wcms/consumer/shop/shop-data-plans/more-everything.html (*accessed* October 20, 2014).

Dr. Roetter does not include retail rates for Sprint. For data only plans, Sprint charges, for example, $15 for the 1GB plan and $35 for the 3GB plan. In addition, the overage charge for data only plans is $0.05/MB (that is, about $50/GB). *See* Sprint, "Data Only Plans," http://shop.sprint.com/mysprint/shop/plan/plan_wall.jsp?tabId=pt_data_plans_tab&INTNAV=ATG:HE:DataOnlyPlans (*accessed* October 20, 2014).

143 *RWA Model Agreement,* § 5.

144 Although WCX presents this usage cap as a "compromise," [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]. *See* Letter from Matthew A. Henry, Counsel for WCX, to Lisa Saks and Lisa Boehley, Federal Communications Commission, Nov. 21, 2011, at 7-8 (also available in *Complaint*, at 638-639).

145 *Amended Complaint*, ¶¶ 76-77.

146 [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] *See* Table B-4.

147 *Amended Complaint*, ¶ 51.

148 *RWA Model Agreement,* § 5: "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."

roaming with resale. Under the proposed agreement, WCX can pay for roaming at (sub)retail rates and resell mobile services as a wholesaler. Such provisions are at odds with the core justification for roaming, namely allowing temporary access to another carrier's network when subscribers travel outside the home carrier's area. AT&T's roaming agreements with other providers [BEGIN CONFIDENTIAL] [END CONFIDENTIAL].[149] Similarly, the absence of limits on specific customer roaming gives WCX the incentive to resell the service to consumers who reside outside of WCX's home area or otherwise primarily rely on AT&T's network for mobile data services.[150]

103. I further find that WCX's explanation of its purported need for and prospective use of AT&T's data roaming service is not consistent with the Commission's data roaming policies.[151] While WCX should be free to innovate and develop new services, it cannot expect to do so by free-riding on AT&T's network. As WCX admits, it has not even built out half of its own service area.[152]

104. WCX's current position is that roaming cannot constitute resale because "the technical arrangement between the parties is entirely different."[153] Based on this limited technical definition, WCX claims, incorrectly, that even roaming exceeding 90 percent of total traffic is not resale because WCX's "intention" is to supply primary home-based service and roaming as a supplemental service.[154] Mr. Feldman goes even further to claim 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."[155, 156]

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149 *See* n. 81 above.

150 The Commission also noted that providers commonly include end-user provisions authorizing termination of service when a subscriber's roaming on other networks becomes too large. *Data Roaming Order*, ¶ 21.

151 *See, e.g., Amended Complaint*, ¶ 52.

152 *See Feldman Declaration*, ¶ 22: "WCX's coverage area is currently geographically more than 35% of its CMA." Mr. Feldman also stated that, as of July 2014, WCX had 14 cell sites installed and operational (only eight providing retail service) and less than 500 retail subscribers. *See* Email from Lowell Feldman to George Meadors, July 29, 2014 (also available in *Complaint*, at 414-416).

153 *Amended Complaint*, n. 156. *See also Id.*, ¶ 55. Mr. Feldman also argues that roaming is not resale because customers need to contract with WCX before they can roam on AT&T's network. *Feldman Declaration*, ¶ 19. Similarly, WCX claims that roaming is always "through the front door." *Amended Complaint*, ¶ 46.

154 *Amended Complaint*, n. 157.

155 *Feldman Declaration*, ¶ 19.

156 WCX's current position differs from its previous statements to the Commission in which WCX agreed that [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]. *See* Letter from Matthew A. Henry, Counsel for WCX, to Lisa Saks and Lisa Boehley, Federal Communications Commission, Nov. 21, 2011, at 7 (also available in *Complaint*, at 638) (*emphasis added*).

105. WCX's reliance on the technical aspects of a roaming arrangement – rather than the economic nature and the implications of the transaction – ignores the Commission's goal of preventing roaming from being employed as *de facto* resale. The proposed terms allow WCX to use roaming to resell mobile data services and free ride on AT&T's investments in the scope and quality of its network coverage.[157] Furthermore, WCX does not identify any commercially negotiated roaming agreement in any context that provides for WCX's proposed open-ended ability to resell data services.

106. Finally, WCX claims that the *RWA Model Agreement* is the result of a consensus among "dozens of operators" regarding standard terms and conditions in roaming agreements. However, WCX has not provided any evidence that the *RWA Model Agreement,* or similar terms, have been used in existing data roaming agreements between two relevant parties, such as a national facilities-based provider and a regional facilities-based provider. To the contrary, the terms in the *RWA Model Agreement* regarding usage and resale are not consistent with agreements that AT&T has signed with other rural providers.[158]

D. Other provisions in WCX's proposal are not the product of an arm's length negotiation nor have they been road tested

107. In addition to the terms discussed in the previous sections, the *RWA Model Agreement* contains other terms and conditions that diverge significantly from agreements that resulted from arm's length negotiations between providers. Although I do not rule out the possibility that commercially reasonable contracts may include some of these provisions, WCX has no basis to claim that AT&T should accept these terms and conditions as commercially reasonable – in the context of WCX's proposal.

108. Dr. Roetter incorrectly claims that the "RWA agreement puts no unreasonable restraints on AT&T's freedom of action other than those included in the FCC's Data Roaming Order."[159] To the contrary, some of the terms in the *RWA Model Agreement* (for example, the termination provision discussed below) go well beyond the Commission's *Data Roaming Order* and any signed agreement between AT&T and other providers.

109. In terms of monitoring traffic and managing congestion, the *RWA Model Agreement* prevents the host carrier from giving priority to its own users relative to data roaming when cell site locations are

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[157] *See, e.g., Data Roaming Order*, ¶ 88: "we are concerned that construing the rule we adopt as allowing a roaming provider to engage in unauthorized use of a competitor's brand name recognition and/or service quality reputation as a means of differentiating the roaming provider's own service may indeed encourage the use of roaming as *de facto* resale."

[158] *See* Section V.C for AT&T contract terms with other providers regarding usage and resale.

[159] *Roetter Public Decl.*, at 165.

congested.[160] On its face, the *RWA Model Agreement* is inconsistent with WCX's claim that a commercially reasonable agreement "cannot prejudice AT&T's ability to provide retail service to its own customers."[161]

110. As discussed above, it doesn't make economic sense for the host carrier potentially to reduce the quality of the service provided to its own retail customers in order to provide roaming services to another carrier's subscribers. WCX proposes to roam on another carrier's network *at retail rates* and without any provision that gives priority to the host carrier's retail subscribers (who are paying the same price or more) when cell sites are congested. This makes the WCX proposed roaming agreement uneconomic for the host carrier when network congestion is a concern, which is unreasonable. Furthermore, build-out costs differ according to population density, spectrum propagation characteristics, and topography, among other factors. The single retail price proposed in the *RWA Model Agreement* does not take into account this heterogeneity and therefore, when congestion arises, it is likely to occur in regions in which the retail rate is not sufficient to cover build-out costs. In those cases, WCX's proposal would require AT&T to make investments with negative rates of return in order to continue to provide a level of service required to maintain satisfaction of its own customers, with WCX benefiting from such investment.

111. WCX does not believe that the roaming agreement requires any audit terms.[162] Although WCX argues that its proposed usage restriction would be "simple and easy to administer and verify," it does not provide for a specific mechanism by which AT&T would verify the usage provisions. In particular, it does not provide a mechanism for AT&T to obtain information on total traffic volume of WCX's end-users (which is only available to WCX) in order to calculate roaming usage as a percentage of total traffic volume. As stated, and considering that AT&T has been involved in years of litigation with Mr. Feldman's companies, WCX's proposal to exclude any audit terms is not commercially reasonable.

112. The proposed *RWA Model Agreement* also contains an odd provision that the roaming agreement is set to continue in "perpetuity" and cannot be terminated by a single party.[163] This is not only

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160 *Roetter Non-Public Decl.*, at 204: "The purpose of these definitions is to ensure that AT&T treats roaming traffic no less favorably than traffic involving its own customers." *See also Amended Complaint*, ¶¶ 62, 88-89.

161 *Amended Complaint*, ¶ 16. In addition, WCX's claim that there should be only "application-neutral" packet inspection or manipulation contradicts its own proposal to exclude M2M and "Internet of Things" applications from any usage restrictions. *See RWA Model Agreement*, § 5: "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…" *See also Amended Complaint*, ¶ 51. Even though these applications would affect the network like any other device, WCX proposes to make an exception based on the type of application these services use.

162 *Amended Complaint*, ¶¶ 76-77.

163 *See RWA Model Agreement*, §§ 2, 13. Section 13 specifies that the agreement cannot be terminated by a single party unless (i) the other party is in material breach; (ii) data roaming becomes technically impracticable; (iii) an unacceptable level of unauthorized use occurs and the other party is not capable of

inconsistent with existing roaming agreements, but also unusual in commercial contracts. AT&T's roaming agreements [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]. As a general matter, companies do not want to commit to agreements in perpetuity without the ability to change contract terms as market conditions evolve. In the relatively new LTE context, technical and economic conditions can change in ways that would make an existing roaming agreement no longer attractive or unreasonable for either party.

113. The "perpetuity" provision in the *RWA Model Agreement* is all the more unreasonable considering that it attempts to set data roaming rates based on an inaccurately specified and inherently imprecise benchmark (the "prevailing industry retail rate"), without clear mechanisms, adjustment periods, or references to be used to revise such benchmark rate as industry retail rates change over time.[164]

E. WCX has not shown that AT&T has the incentive to deny roaming to small carriers

114. Finally, WCX claims, without basis, that AT&T has "every incentive" to deny roaming "on any terms" in order to make its smaller competitors less attractive to retail customers and thereby sign on those customers to AT&T's own retail service.[165] WCX does not provide any analysis to show that AT&T has such incentive. As I have mentioned, AT&T competes with Verizon, Sprint, and T-Mobile, among others, both in WCX's service area and adjacent metropolitan areas. To perform the analysis required to substantiate WCX's claim, one would need to estimate, for example, how many of each requesting provider's customers would switch to AT&T's service—as opposed to other providers' service. WCX seems to assume, implicitly, that AT&T would capture most or all of the requesting provider's customers. In addition, WCX has not shown that smaller competitors (similar to WCX) cannot roam on other carriers or that they would be unsustainable without a roaming agreement with AT&T. If, as here, requesting providers had other roaming alternatives, AT&T's alleged foreclosure strategy would be unprofitable because AT&T would lose roaming revenues without recapturing a significant number of customers through its own retail service.

115. WCX's theory also ignores that, to the extent that most requesting providers have built out and do not rely extensively on roaming on other networks, roaming costs are only a small fraction of their total service revenues. In addition, AT&T is a net purchaser of roaming overall as it relies more on roaming on other networks, typically in rural regions. Finally, many of AT&T's roaming agreements are reciprocal and, overall, AT&T pays relatively similar rates when it roams on other networks than

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remedying the issue within 30 days; or (iv) the Commission revokes or denies renewal of a party's license(s) or permissions to operate a network.

164 *RWA Model Agreement*, Exhibit 2.

165 *Amended Complaint*, ¶ 13. *See also Feldman Supp. Decl.*, ¶ 9.

the rates it charges when other providers roam on AT&T's network. As a result, AT&T tends to lose money when there is a general increase in roaming rates.

VERIFICATION PAGE

I hereby swear under penalty of perjury that the foregoing is true and correct.

Jonathan Orszag

Dated: November 4, 2014

APPENDIX A

CURRICULUM VITAE – JONATHAN ORSZAG

CURRICULUM VITAE

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PROFESSIONAL EXPERIENCE:

- **Senior Managing Director**, Compass Lexecon, previously Competition Policy Associates, Inc. ("COMPASS") and FTI Consulting, Inc. January 2006-Present; Competition Policy Associates, Inc./Sebago Associates, Inc., March 2000-January 2006. Manage economic consulting firm specializing in antitrust, economic policy, and litigation matters. Member of the firm's Executive Committee. Conduct economic and financial analysis on a wide range of complex issues in policy and regulatory for corporations and public-sector entities. Serve as expert witness in proceedings before U.S. and international courts and administrative agencies and the European Court of First Instance on competition policy issues, including industry structure, vertical relationships, and intellectual property rights. Consult on international projects in Argentina, Australia, The Bahamas, Canada, Ecuador, the European Union, New Zealand, South Korea, Trinidad and Tobago, and the United Kingdom.
- **Assistant to the Secretary and Director of the Office of Policy and Strategic Planning,** U.S. Department of Commerce (Washington, D.C.), March 1999-March 2000. Served as the Secretary of Commerce's chief policy adviser. Responsible for coordinating the development and implementation of policy initiatives within the Department. Worked on a wide range of issues, from implementing the steel loan guarantee program to telecommunications and e-commerce issues. Represented the Secretary of Commerce in meetings with other government officials and outside organizations, and testified before Congress on behalf of the Department on budget and Native American economic development issues.
- **Economic Policy Advisor**, National Economic Council, The White House (Washington, D.C.), August 1997-March 1999; Assistant Director, January 1996-November 1996. Coordinated policy processes on a wide range of issues, from Social Security reform to job training reform, unemployment insurance reform, homeownership and low-income housing issues, the minimum wage, and Individual Development Accounts. Responsible

for helping to coordinate the Administration's daily economic message and to promote (and defend) President Clinton's economic record.

- **Economics Teacher,** Phillips Exeter Academy Summer School (Exeter, New Hampshire), June 1997-August 1997. Taught introductory economics at Phillips Exeter Academy Summer School.
- **Economic Consultant,** James Carville (Washington, D.C.), August 1995-January 1996. Helped James Carville, President Clinton's 1992 campaign strategist, research and write his *New York Times* #1 best-selling book, *We're Right, They're Wrong: A Handbook for Spirited Progressives*.
- **Special Assistant to the Chief Economist**, U.S. Department of Labor, (Washington, D.C.), August 1994-August 1995. Served as an economic aide to the Chief Economist (Alan B. Krueger) and the Secretary of Labor (Robert B. Reich).

Volunteer Positions

- **Director of Policy Preparations for Vice Presidential Debate,** Gore-Lieberman Presidential Campaign, September 2000-October 2000. Oversaw policy preparations for Democratic Vice Presidential candidate before his debate with the Republican Vice Presidential candidate.
- **Weekly Commentator,** *Wall Street Journal Online*, September 2004-November 2004. Commented on economic issues during the 2004 presidential campaign. Topics of weekly commentary included jobs, health care, energy, trade, taxes, tort reform, appointments, and fiscal policy.

EDUCATION:

- Oxford University, M.Sc. in Economic and Social History, 1997
- Princeton University, A.B. *summa cum laude* in Economics, 1996
- Phillips Exeter Academy, graduate with High Honors, 1991

HONORS, PROFESSIONAL ASSOCIATIONS, AND APPOINTMENTS:

- Phi Beta Kappa, inducted June 1996
- Marshall Scholar, 1996
- *USA Today* All-USA College Academic Team, 1996
- Corporation for Enterprise Development Leadership Award for "Forging Innovative Public Policies to Expand Economic Opportunity in America," 1999
- *Who's Who in America*, 2001-Present; Also, *Who's Who in the World*; *Who's Who in Science and Engineering*; *Who's Who in Finance and Business*; and *Who's Who of Emerging Leaders*
- California Workforce Investment Board, 2000-2003
- California Governor's Technology Advisory Group, 2000-2003

- Adjunct Lecturer, University of Southern California (Los Angeles, CA), January 2002-June 2002.
- *Global Competition Review*'s "40 under 40: The World's 40 Brightest Young Antitrust Lawyers and Economists," 2004
- *Global Competition Review*'s "Best Young Competition Economists," 2006
- *The International Who's Who of Competition Economists*, 2007-Present
- LawDay Leading Competition Economics Experts, 2009-Present.
- Expert Guides, Best of the Best USA, 2011-Present.
- Fellow, University of Southern California's Center for Communication Law & Policy, 2007-Present.
- FTI Consulting Inc., Founders Award, 2008.
- Senior Fellow, Center for American Progress, 2009-Present
- Board of Directors, Sebago Associates, Inc., 2000-2007; Competition Policy Associates, Inc., 2003-2006; The First Tee of Washington, DC, 2005-2011; Ibrix, Inc. (Sold to Hewlett-Packard), 2006-2007; JMP Securities, Inc. (NYSE: JMP), 2011-Present; Tiger Woods Foundation, Board of Governors, 2012-Present; Children's Golf Foundation, 2013-Present.
- Clinton Global Initiative, Member, 2008-Present; Grassroot Soccer, Ambassadors Council, 2010-Present; The First Tee, Trustee, 2013-Present.
- Member of the American Economic Association, the Econometric Society, the American Finance Association, and the United States Golf Association.

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APPENDIX B

TABLES

TAB 5

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 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	)	

AFFIDAVIT REGARDING RESPONSES BASED ON INFORMATION AND BELIEF PURSUANT TO RULE 1.724(b)

JAMES F. BENDERNAGEL, JR., being duly sworn, desposes and says:

1. My name is James F. Bendernagel, Jr. I am a partner in the law firm of Sidley Austin LLP, and a counsel of record for AT&T Mobility LLC ("AT&T") in this matter filed by Worldcall Interconnect, Inc. ("WCX") (together with AT&T, the "Parties"). In my capacity as counsel of record, I have been involved in preparing AT&T's response to WCX's Amended Complaint filed on October 1, 2014 (the "Amended Complaint"), as well as preparing AT&T's First Set of Interrogatories, which seek information from WCX regarding certain of the matters addressed by this Affidavit.

2. In responding to the Amended Complaint, AT&T has denied certain allegations on the grounds that AT&T does not have sufficient information to admit or deny those allegations. This Affidavit is submitted in good faith pursuant to Section 1.724(b) of the Federal Communication Commission's Rules, 47 C.F.R. § 1.724(b), to address AT&T's denials based upon information and belief. Further, as previously noted, AT&T has

requested that WCX provide information relating to those allegations for which AT&T lacks sufficient information but deems relevant to the Parties' dispute. *See* AT&T's First Set of Interrogs. Nos. 1-9.

3. Paragraphs 5, 22, 23, and 59 of the Amended Complaint set forth allegations as to the number and nature of WCX's current, potential, or targeted customers, including whether they are individuals or businesses, whether they are located in CMA 667, and assumptions about the number of devices and level of use by the WCX user base. Upon knowledge, information, and belief, AT&T is without sufficient information as to these allegations to admit or deny them. WCX has not provided any documentary evidence substantiating its allegations in this regard. Moreover, information relating to these allegations was not provided to AT&T in connection with the Parties' negotiations over the data roaming agreement. Further, the information at issue is uniquely within the possession of WCX and thus is not capable of being validated by a search of public records. For these reasons, AT&T does not have sufficient information to admit or deny these allegations and, for this reason, has denied them.

4. Paragraphs 5, 19, 23, 26, 27, 48, 49, 57, 78, 81, and 85 of the Amended Complaint set forth allegations regarding the nature of WCX's business model, its service offerings, its network investments, its operations, the build-out of facilities in its home service area, and whether AT&T could use WCX's network. Upon knowledge, information, and belief, AT&T is without sufficient information as to these allegations to admit or deny them. WCX has not provided any documentation substantiating these allegations. Further, this information is uniquely within the possession of WCX and thus is not capable of being validated by a search of public records. For these reasons, AT&T does

not have sufficient information to admit or deny these allegations and, for this reason, has denied them.

5. Paragraphs 21, 26, 28, 52, 57, 78, and 85 of the Amended Complaint contain allegations about WCX's future intentions and expectations concerning investments, growth, its intentions to participate in certain markets, and use of data roaming to attract certain customers or to work with developers of applications and other technology, and whether these prospects and plans are viable. Upon knowledge, information, and belief, AT&T is without sufficient information as to these allegations to admit or deny them. WCX has not provided any documentation substantiating these allegations, such as business plans or projections. Further, this information is uniquely within the possession of WCX and thus is not capable of being validated by a search of public records. For these reasons, AT&T does not have sufficient information to admit or deny these allegations and, for this reason, has denied them.

6. Paragraphs 6, 7, and 17 of the Amended Complaint contain allegations about the business model prerequisites, such as the terms and the pricing for roaming access, for small rural providers in order to attract and retain customers, and for providers that seek to innovate in emerging markets known as Machine-to-Machine ("M2M") and "Internet of Things." Upon knowledge, information, and belief, AT&T is without sufficient information as to these allegations to admit or deny them. WCX has not provided any materials substantiating its allegations regarding these matters. Further, this information is uniquely within the possession of WCX and thus is not capable of being validated by a search of public records. For these reasons, AT&T does not have sufficient information to admit or deny these allegations and, for this reason, has denied them.

7. Paragraphs 7 and 9 of the Amended Complaint contain allegations about the requirements and assumptions that application software and device developers use for their products and business models. Upon knowledge, information, and belief, AT&T is without sufficient information as to these allegations to admit or deny them. WCX has not provided as part of its complaint submission any documentation substantiating these allegations. Further, this information is uniquely within the possession of WCX and thus is not capable of being validated by a search of public records. For these reasons, AT&T does not have sufficient information to admit or deny these allegations and, for this reason, has denied them.

8. Paragraphs 8 and 82 of the Amended Complaint contain allegations about whether and how M2M and "Internet of Things" might affect various industries and may involve devices that might spend significant time outside of a small carrier license area. Upon knowledge, information, and belief, AT&T lacks sufficient information as to these allegations to admit or deny them. These allegations are generally based on broad categorical statements by WCX's declarants. WCX has not provided specific information validating these claims nor has it provided data linking these claims to WCX's operations. Such information is uniquely within the possession of WCX and thus is not capable of being validated by a search of public records. Consequently, AT&T does not have sufficient information to admit or deny these allegations and, for this reason, has denied them.

9. Paragraph 25 of the Amended Complaint sets forth allegations as to why WCX elected not pursue its formal complaint against AT&T in May 2012. Upon knowledge, information, and belief, AT&T is without sufficient information as to these allegations to

admit or deny them. WCX has not provided any documentary evidence substantiating these allegations. Further, this information is uniquely within the possession of WCX and thus is not capable of being validated by a search of public records. Consequently, AT&T does not have sufficient information to admit or deny these allegations and, for this reason, has denied them.

10. Paragraphs 29, 30, and 44 of the Amended Complaint contain allegations as to the Rural Wireless Association's ("RWA") ambitions and objectives in developing the RWA Model Agreement as well as the nature and duration of the work involved in formulating and subsequently updating that Model Agreement. Upon knowledge, information, and belief, AT&T is without sufficient information as to these allegations to admit or deny them because WCX has not provided, as part of its complaint submission, any documentation supporting its allegations about the RWA or the RWA Model Agreement. Further, AT&T does not have access to such information from public sources. Consequently, AT&T does not have sufficient information to admit or deny these allegations and, for this reason, has denied them.

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JANE DALEY NOTARY PUBLIC DISTRICT OF COLUMBIA EXPIRES JULY 31, 2019

District of Columbia
Subscribed and sworn before me
this 5TH day of November, 2014.

Notary Public

My Commission Expires: 7/31/2019

TAB 6

REVISED
PUBLIC VERSION

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	)	

LEGAL ANALYSIS IN SUPPORT OF AT&T'S ANSWER

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INTRODUCTION AND SUMMARY

The Commission's data roaming rules require AT&T to offer WCX a roaming agreement with commercially reasonable rates and terms.[1] AT&T's proposal here easily complies with this standard. AT&T has proposed rates that are well within the range of rates that prevail in its existing marketplace agreements. AT&T also has proposed limits on usage designed to prevent the roaming arrangement from becoming a *de facto* resale arrangement, with additional terms to enforce those limitations. Those terms, too, are commonplace throughout the industry and are plainly commercially reasonable.

WCX's position, by contrast, is based on a profound misreading of the *Data Roaming Order* and an equally profound misunderstanding of the commercial reasonableness standard. WCX insists that AT&T must offer: (i) sub-penny roaming rates tied to retail rates that are far below the rates found in all of AT&T's other presumptively reasonable marketplace roaming agreements; (ii) unlimited "roaming" that WCX will "endeavor" to keep below 50% of all of its traffic but which on its face would permit 100% of WCX's wireless services to be offered via AT&T's network; (iii) no audit, service suspension, or other standard contract rights to enforce even those watered-down usage limitations; and (iv) such terms in perpetuity. No reasonable wireless data provider, in the real world, would ever accept such a radically one-sided arrangement as "commercially reasonable." Equally important, WCX's version of commercial reasonableness would improperly rewrite the *Data Roaming Order* and turn the Commission's data roaming rules into precisely the rate prescription and "backdoor resale" the Commission intended to prevent.

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[1] 47 C.F.R. § 20.12(e)(1). The Commission requires "facilities-based provider[s] of commercial mobile data services" to offer data roaming agreements to other such providers on commercially reasonable terms and conditions, subject to certain limitations. *See, e.g.*, *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Rcd. 5411, ¶ 1 (2011) ("*Data Roaming Order*").

The Commission's commercial reasonableness standard has several key elements. First and foremost, the broadband data services at issue here are not common carrier services, and the D.C. Circuit has found it "obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers."[2] Accordingly, the commercial reasonableness standard is—and *must* be—considerably more flexible than the just and reasonable standard applicable to common carriage. This means that the data roaming rules necessarily allow for a *broader* range of rates than the "just and reasonable" ratemaking standard of common carriage regulation which itself contemplates a range, or "zone," of acceptable rates.[3] And it also means that the data roaming rules allow providers wide latitude in proposing terms for negotiation.

The Commission also wanted to make sure that the data roaming obligations did not discourage broadband investment.[4] Accordingly, the Commission made clear that data roaming obligations may not be used by requesting providers "as a backdoor way to create *de facto* mandatory resale obligations."[5] In addition, the Commission explicitly noted its expectation that

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[2] *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014) (citing *Cellco P'ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012)); *see also Cellco*, 700 F.3d at 545 ("[t]he Commission concedes that . . . it has no authority to treat mobile-data providers like Verizon as common carriers"); *id.* at 538 ("mobile-data providers are statutorily immune, perhaps twice over, from treatment as common carriers"); 47 U.S.C. § 332(c)(2) & (d)..

[3] *FPC v. Conway Corp.*, 426 U.S. 271, 278 (1976) ("there is no single cost-recovering rate, but a zone of reasonableness: [s]tatutory reasonableness is an abstract quality represented by an area, rather than a pinpoint" (internal quotation marks and citation omitted)); 47 U.S.C. § 201.

[4] *Data Roaming Order* ¶ 34 (data roaming requirements create "the possibility that requesting providers will substitute roaming for investment in coverage and accordingly under-invest in deploying new infrastructure"); *see also id.* ¶ 21 n.76 (recognizing also that "there are pro-competitive benefits that flow from carriers differentiating themselves on the basis of coverage," and thus host providers may have a disincentive to invest in their networks if other providers can "free-ride" on their investment via roaming"); *id.* ¶¶ 16-22, 33-34.

[5] *Data Roaming Order* ¶ 88; *see also id.* ¶ 42 n.122 ("As we have stated in the past, however, roaming arrangements cannot be used as a backdoor way to create *de facto* mandatory resale obligations."); *id.* ¶ 34 ("we provide that the data roaming obligation does not create mandatory resale obligations"). To be sure, nothing in the *Data Roaming Order* prohibits two wireless providers from voluntarily entering into a resale agreement pursuant to whatever rates, terms, and conditions they find mutually acceptable. Indeed, such non-regulated agreements are commonplace across the wireless industry and AT&T itself is a party to numerous such agreements. Rather, what the *Data Roaming Order* prohibits, and what AT&T objects to here, is the misapplication of the data roaming rules to give

roaming rates ordinarily would substantially exceed retail rates to avoid undermining incentives for facilities-based build-out: "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 carrier's network."[6] In doing so, the Commission relied upon its prior roaming orders that expressly rejected retail rates as a "benchmark" for evaluating the reasonableness of roaming rates.[7]

Consistent with the broad flexibility of the commercial reasonableness standard, the Commission has also held that particular disputes will be resolved "based on the totality of the circumstances," including, but not limited to, the seventeen factors enumerated in the *Data Roaming Order*.[8] The best evidence of reasonableness, of course, is the rates and terms that have been negotiated at arm's length in the commercial marketplace. When rates and terms are directly observable in the marketplace (as they are here), and broadband data providers are competing successfully in reliance on those rates and terms (which is also the case), then any offer that is generally consistent with such rates and terms should be "commercially reasonable" within the meaning of the Commission's rules.[9] Indeed, the Commission has indicated that

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one party a unilateral right to demand terms and conditions that have the practical effect of converting a regulated data roaming agreement into a regulated resale agreement.

[6] *Data Roaming Order* ¶ 21; *see also id.* ¶ 51 ("As discussed above, the relatively high price of roaming compared to providing facilities-based service will often be sufficient to counterbalance the incentive to scale back deployments in favor or relying on another provider's network.").

[7] *E.g.*, *Data Roaming Order* ¶ 21; *accord In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817, ¶ 40 n.102 (2007) ("*Voice Roaming Order*"); *see also Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, 25 FCC Rcd. 4181, ¶ 32 n.90 (2010) ("*Voice Roaming Order on Reconsideration*") (fact that "roaming rates [are] *much higher* than retail rates" would preserve investment incentives) (emphasis added).

[8] *Data Roaming Order* ¶¶ 74, 86.

[9] *Data Roaming Order* ¶¶ 81, 86; *accord Matthews v. Wis. Energy Corp.*, 642 F.3d 565, 572 (7th Cir. 2011) ("A willingness to pay is an indication of commercial reasonableness.").

signed marketplace agreements that have never been challenged will be *presumed* to be commercially reasonable.[10]

The only question in this case is whether AT&T's proposal is commercially reasonable, and AT&T easily satisfies that standard. First, AT&T's proposed rates are fully consistent with other marketplace agreements and are thus plainly commercially reasonable. Indeed, AT&T's proposed roaming rates represent *significant discounts* on the average rate AT&T itself pays for data roaming pursuant to its data roaming agreements with other wireless carriers.[11] WCX does not dispute that AT&T's proposed LTE rate is consistent with the prevailing wholesale rate in the marketplace; instead, it argues that the rules somehow require AT&T to propose rates that are no higher than retail rates. In fact, the Commission has expressly rejected retail rates as a benchmark for wholesale roaming rates, and has indicated that it expects roaming rates to be "*much higher* than retail rates"[12] in order to "counterbalance the incentive" to "rely[] on another provider's network."[13]

Similarly, AT&T's proposed usage restrictions are commercially reasonable and are commonplace in AT&T's agreements with numerous other wireless providers. The Commission has expressly held that requesting providers like WCX may not use data roaming as "a backdoor

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[10] *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.").

[11] Meadors Decl. ¶ 48; Orszag Decl. ¶¶ 10, 48-54, 64-65.

[12] *Voice Roaming Order on Reconsideration* ¶ 32, n.90; *see also Voice Roaming Order* ¶¶ 37-40 & n.102 (rejecting as "flawed" "a price cap based on a benchmark of retail rates").

[13] *Data Roaming Order* ¶ 51; *see also id.* ¶ 21 ("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 carrier's network"); *Voice Roaming Order* ¶¶ 37-40 & n.102.

way to create *de facto* mandatory resale obligations."[14] AT&T thus has every right under the rules to propose terms that seek to protect its investment in its network from practices that would turn its roaming offer into backdoor resale. These provisions are not intended to, and do not, prevent ordinary roaming outside the requesting provider's network, and AT&T has been willing to negotiate the precise limits of these restrictions to meet the legitimate roaming needs of its various roaming partners. But WCX's position—as embodied in its radically one-sided RWA Model Agreement—is clearly aimed at forcing AT&T to offer terms that would allow essentially unfettered resale on AT&T's network across the nation.

WCX's challenges to various other terms in the AT&T proposal, such as the audit and termination provisions, are equally baseless. Those terms are necessary to enforce the agreement's provisions that ensure that WCX does not use these data roaming services as *de facto* resale. Such terms are standard in all of AT&T's roaming agreements, and insofar as these provisions support AT&T's efforts to protect against backdoor resale, they are plainly commercially reasonable. But these provisions are especially reasonable as they relate to WCX. The Worldcall family of companies has engaged in a variety of regulatory arbitrage schemes over the years, and is a frequent litigant in intercarrier disputes at the Commission, in the courts, and before state public utility commissions. In the past, AT&T has had to litigate payment disputes with Mr. Feldman's other companies, and provisions like the audit provision were included in the AT&T proposal in an attempt to avoid the expense of further dispute resolution.[15] Indeed, given AT&T's prior experience with Mr. Feldman's other companies, it would be

[14] *Data Roaming Order* ¶ 88; *see also id.* ¶ 41 n. 122 ("As we have stated in the past, however, roaming arrangements cannot be used as a backdoor way to create *de facto* mandatory resale obligations."); *id.* ¶ 34 ("we provide that the data roaming obligation does not create mandatory resale obligations").

[15] Meadors Decl. ¶ 54.

commercially *unreasonable* for the Commission to require AT&T to bear the risk of yet another default without at least affording AT&T the minimal protections included in the AT&T proposal.

Finally, WCX's Amended Complaint also includes a smattering of additional claims under a variety of different provisions in the Communications Act.[16] None has merit. Most notably, WCX argues that AT&T's offer of data roaming is actually governed by Title II and the common carrier *voice* roaming rules, on the theory that some of WCX's traffic may be Voice over Internet Protocol ("VoIP") traffic. That claim is frivolous. WCX has not sought access to AT&T's voice network that is interconnected with the public switched telephone network, and WCX concedes that it will provide all traffic under its proposed agreement as data packets such that "[t]o AT&T it will be no different than when WCX's customer is surfing the web or receiving an e-mail."[17] For the same reasons, Sections 201, 202, and 332 are inapplicable, because they govern common carrier services. Section 301 merely states the purposes of Title III, but does not establish any substantive obligations. And neither Section 157(a) nor Section 1302 imposes any substantive obligations on AT&T or authorizes WCX to file a suit before the Commission based on a "violation" of their terms.

BACKGROUND

A. AT&T'S DATA ROAMING AGREEMENTS WITH OTHER WIRELESS PROVIDERS

AT&T has negotiated roaming agreements with almost all of the U.S. wireless providers that market handsets compatible with AT&T's networks.[18] AT&T currently has more than 35

[16] See Am. Compl. ¶ 41.

[17] WCX Legal Analysis (Compl. at 271-72).

[18] Meadors Decl. ¶ 7.

commercially-negotiated data roaming agreements with other U.S. wireless carriers, including major carriers such as T-Mobile and U.S. Cellular as well as numerous smaller carriers.[19]

As a result of its extensive experience negotiating and entering into data roaming agreements, AT&T has developed a draft agreement which serves as the basis for its initial offer when it negotiates a data roaming arrangement on its own network.[20] The draft agreement is used as a starting point for negotiations, and the parties may modify it as needed to suit the particular circumstances of a given roaming arrangement.[21] The draft agreement reflects the kinds of terms and conditions that, in AT&T's experience, wireless providers normally will accept in arm's-length negotiations. For example, the draft agreement sets forth limits both on total data usage as well as individual customer usage and permits each Party to manage traffic on its network in a manner consistent with the Commission's rules and precedent.[22]

Eight of AT&T's current roaming agreements specify rates for LTE-based data roaming, three of which are strategic agreements (which involve a spectrum lease agreement).[23] In each of the arm's-length, non-strategic agreements, the LTE roaming rate is [BEGIN CONFIDENTIAL] [END CONFIDENTIAL], which is exactly the rate AT&T offered to WCX.[24] In addition, AT&T's data roaming agreements [BEGIN CONFIDENTIAL]

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[19] *Id.*

[20] *Id.* ¶ 11.

[21] *Id.*

[22] *Id.*

[23] Orszag Decl.¶ 50.

[24] *Id.*

[25] *Id.*

[END CONFIDENTIAL].[26]

Including all data roaming between AT&T and its domestic partners under AT&T's roaming agreements, the weighted average data roaming rate during the period from January to August 2014 was [BEGIN CONFIDENTIAL] [END CONFIDENTIAL].[27] AT&T paid an average data-roaming rate of [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] to roam on other providers' networks, while other providers paid an average data-roaming rate of [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] to roam on AT&T's network.[28] Notably, rural providers that have entered into data roaming agreements with AT&T have paid these rates and still managed to invest in upgrading their networks and expanding the services they offer to their customers.[29] Overall, AT&T is a net purchaser of data roaming as it purchases more roaming on other networks (typically in rural regions) than it sells on its own network.[30]

B. WCX AND ITS SERVICE AREA

WCX is a subsidiary of Worldcall, Inc., a telecommunications services and investment holding company formed in April 2004.[31] Mr. Feldman and the Worldcall companies are frequent litigants in inter-carrier disputes at the Commission, in the courts, and before state public utility commissions.[32] Mr. Feldman previously was the CEO of UTEX Communications Corp. (d/b/a FeatureGroup IP) ("UTEX"), which ended up owing AT&T entities millions of

[26] *Id*. ¶ 51.

[27] *Id*. ¶ 52.

[28] *Id*.

[29] Orszag Decl. ¶ 89.

[30] Meadors Decl. ¶ 9; Orszag Decl. ¶¶ 52, 115.

[31] Meadors Decl. ¶ 12.

[32] *Id*., Exs. 3, 4.

dollars when it filed for chapter 11 bankruptcy protection in March 2010.[33] UTEX's case was later converted to a chapter 7 liquidation, and the company ceased operations in December 2013.[34]

WCX holds a 700 MHz Lower Band (B Block) license to provide wireless services in Cellular Market Area ("CMA") 667, which covers an area of central Texas that is bounded by the major population centers of Houston, San Antonio, and Austin.[35] The residents of CMA 667 enjoy a competitive wireless marketplace: (i) nationwide wireless providers such as AT&T, Verizon, and Sprint all offer wireless services to the majority of CMA 667; and (ii) a number of smaller wireless providers such as Texas Broadband, Inc., and Ranch Wireless, Inc., also serve communities, farms, and ranches in CMA 667.[36] According to WCX, its wireless network covers approximately 35% of CMA 667.[37]

C. AT&T'S INITIAL DEALINGS WITH WCX IN 2011 TO 2012

On June 1, 2011, WCX approached AT&T regarding a potential LTE data roaming agreement.[38] Because it was in the process of rolling out its LTE network, AT&T was interested in working with wireless carriers like WCX to provide data roaming services.[39] During late June and early July 2011, the Parties engaged in technical discussions and later executed a nondisclosure agreement.[40]

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[33] *Id.* ¶ 12.

[34] *Id.*

[35] *Id.* ¶ 13.

[36] *Id.*

[37] *Id.*

[38] *Id.* ¶ 15.

[39] *Id.*

[40] *Id.*

On July 20, 2011, AT&T provided to WCX a draft LTE data roaming agreement.[41] The draft agreement was a two-way data roaming agreement pursuant to which each Party would have the right—but not the obligation—to roam on the other Party's LTE network.[42] Although AT&T indicated its belief that the Parties could negotiate in good faith and reach agreement on commercially-reasonable terms, WCX did not provide an alternative LTE roaming contract or propose specific modifications to the AT&T draft.[43] Instead, WCX rejected AT&T's proposal and took the categorical positions similar to those it advances here.[44] From AT&T's perspective, the major sticking point in the negotiations was the Parties' extremely divergent views on roaming rates.[45] While WCX insisted on rates tied to the "prevailing retail rate," AT&T proposed to use the market rate for roaming services as established in AT&T's dozens of data roaming agreements with other wireless carriers.[46]

Having reached an impasse, on October 11, 2011, the Parties sought the assistance of the Commission in attempting to negotiate a data roaming agreement.[47] 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.[48] The Parties made submissions to the Commission setting forth their respective positions, participated in a full-day negotiating session with Commission Staff, and engaged in further discussions.[49] However, the Parties still did not reach

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[41] *Id.* ¶ 16.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* ¶ 17.

[46] *Id.*

[47] *Id.* ¶ 18.

[48] *Id.*

[49] *Id.*

an agreement.[50] On May 2, 2012, WCX submitted a request to the Commission for permission to file a complaint against AT&T on the Commission's accelerated docket, which request the Commission denied, noting that WCX could file a complaint pursuant to the Commission's rules.[51] But WCX did not file a complaint with the Commission at that time, and AT&T heard nothing further from WCX about a data roaming agreement for over two years.[52]

D. AT&T'S RENEWED NEGOTIATIONS WITH WCX IN 2014

WCX did not contact AT&T again about a potential data roaming agreement until June 24, 2014.[53] On that date, Mr. Feldman forwarded the RWA Model Agreement, which he noted was the product of discussions among rural wireless carriers (including WCX) and proposed that it should serve as the basis of an agreement between AT&T and WCX.[54] The RWA Model Agreement benchmarked the roaming rate to the "prevailing retail rate" ($10/GB, or 0.96¢/MB), stated that the Parties would "endeavor to provide the majority of its customers' mobile data services on its own [n]etwork," and prohibited any usage restrictions.[55] Mr. Feldman also noted, twice in the same email, that he stood ready to call on the Commission to resolve the Parties' impasse.[56]

On July 29, 2014, AT&T provided its proposed data roaming agreement (the "AT&T Proposal") to Mr. Feldman.[57] AT&T's proposed roaming rates [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] and its proposed usage

[50] *Id.*

[51] *Id.* ¶¶ 19, 21.

[52] *Id.* ¶ 21.

[53] *Id.* ¶ 22.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* ¶ 27.

restrictions [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] were the same as AT&T's final proposals during the 2011-12 negotiations, although the proposal differed in other respects.[58] AT&T explained to Mr. Feldman that the proposed roaming rates were significantly below the average rates AT&T was paying pursuant to its data roaming agreements with other wireless carriers.[59] AT&T also asked Mr. Feldman to provide feedback on the proposed agreement.[60] However, Mr. Feldman did not provide comments on the AT&T Proposal and instead insisted once again that the RWA Model Agreement serve as the basis of the Parties' negotiations.[61]

On August 5, 2014, Mr. Feldman served WCX's Notice of Intent to File Formal Complaint and Offer to Discuss Possibility of Settlement (the "Formal Complaint Notice").[62] Pursuant to the Formal Complaint Notice, WCX accused AT&T of failing to negotiate in good faith and warned that, absent a negotiated solution, WCX intended to follow through with its threat to file a formal complaint with the Commission.[63] WCX contended that the AT&T Proposal could not even be used as a starting point for negotiations, particularly with respect to usage restrictions and roaming rates.[64] Finally, WCX put AT&T on notice that unless AT&T was willing to negotiate based on the RWA Model Agreement and compromise significantly on all substantive issues, WCX would file a formal complaint.[65]

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[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* ¶¶ 27-28.

[62] *Id.* ¶ 31.

[63] *Id.*

[64] *Id.*

[65] *Id.*

On August 11, 2014, WCX warned AT&T that unless it ceased arguing with WCX's positions, WCX would file a formal complaint.[66] AT&T responded that it "remain[ed] committed to negotiating in good faith," and that "[w]ith good faith on both sides, most of [the Parties'] differences c[ould] be resolved."[67] AT&T further stated that it "remain[ed] willing to negotiate a commercially reasonable data roaming agreement with WCX."[68] The Parties held a teleconference to discuss their disputes, but it rapidly became apparent that an agreement would not be reached on the two principal sticking points (*i.e.*, usage restrictions and roaming rates).[69]

On August 20, 2014, Mr. Feldman emailed AT&T a further revised draft of the RWA Model Agreement.[70] Mr. Feldman explained that none of the changes in the revised draft was in line with AT&T's positions on the Parties' disputes, and noted that WCX was preparing to file a formal complaint.[71] On August 25, 2014, AT&T informed WCX once again that AT&T remained ready and willing to provide data roaming to WCX at commercially-reasonable rates and terms.[72] On September 8, 2014, WCX filed its initial Complaint.[73]

E. WCX'S ALTERNATIVES TO ROAMING WITH AT&T

Contrary to WCX's claim that a "roaming agreement with AT&T [ ] is a fundamental 'must-have,'"[74] AT&T is not WCX's only potential roaming partner.[75] Indeed, there are many

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[66] *Id.* ¶ 32.

[67] *Id.*

[68] *Id.*

[69] *Id.* ¶ 34.

[70] *Id.* ¶ 35.

[71] *Id.*

[72] *Id.* ¶ 36.

[73] *Id.*

[74] Am. Compl. ¶ 6.

[75] Prise Decl. ¶ 3.

LTE networks in the areas adjacent to WCX's service area and nationwide.[76] In general, what limits a facilities-based provider's ability to roam on other networks is the choice of devices that the provider makes available to its customers.[77] It is WCX's business decision as to which devices to offer.[78] Modern wireless devices support multiple bands, which means that WCX can obtain roaming from any carrier that supports any of the bands in the devices it chooses to sell to its customers.[79] For example, the Google Nexus 7—a device that WCX purports to offer—is capable of roaming on Verizon (Bands 4 and 13), T-Mobile (Bands 2 and 4), C-Spire (Bands 2 and 4), and numerous local and regional wireless providers.[80]

ARGUMENT

I. WCX'S CLAIMS ARE BASED ON A FUNDAMENTAL MISUNDERSTANDING OF THE COMMISSION'S "COMMERCIAL REASONABLENESS" STANDARD

The Commission's data roaming rules require facilities-based providers of mobile data services to offer data roaming to other providers on "commercially reasonable" terms and conditions.[81] WCX's claims here are based on a profound misunderstanding of that standard. The Commission designed the commercial reasonableness standard to balance the core policy goals of widespread availability of data roaming and the need to encourage facilities-based investment.[82] In so doing, the Commission declined to impose specific rate regulations, but rather sought to give parties broad discretion, subject to a requirement of good-faith arm's length

[76] Orszag Decl. ¶¶ 7, 42.

[77] *Id*. ¶ 42.

[78] *Id*.

[79] Prise Decl. ¶ 3.

[80] *Id*.

[81] *Data Roaming Order* ¶¶ 1, 9, 42.

[82] *Id*. ¶¶ 13, 40, 48.

negotiations, thereby permitting a significant range of outcomes.[83] The Commission further made clear that the terms in signed agreements would be presumed to be reasonable.[84] AT&T's proposals here easily fit within these principles, but WCX's radically different interpretations[85] would turn the Commission's standard into precisely the "prescriptive regulation of rates" and endorsement of "backdoor resale" that the Commission explicitly rejected in the *Data Roaming Order*.

Contrary to WCX's suggestion,[86] the Commission has clearly defined the "commercially reasonable" standard, and it has several key elements. First, the broadband data services at issue here are not common carrier services, and Section 332(c) expressly prohibits the Commission from treating a provider of such services "as a common carrier for any purpose under this chapter."[87] Accordingly, the D.C. Circuit has found it "obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers."[88] In recognition of those limitations, the Commission deliberately chose *not* to apply the Title II just and reasonable standard to wholesale data roaming arrangements, and it insisted that "we here *reject* – rather than determine how to enforce – a common carriage requirement of 'just and reasonable' rates, terms, and conditions."[89]

Thus, the commercial reasonableness standard is—and as a statutory matter, *must* be—considerably more flexible than the "just and reasonable" standard of common carrier regulation.

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[83] *Id.* ¶ 21

[84] *Id.*

[85] *See* WCX Legal Analysis (Compl. at 266-85).

[86] *Id.* at 268

[87] 47 U.S.C. § 332(c)(2) & (d); *Cellco*, 700 F.3d at 538 ("mobile-data providers are statutorily immune, perhaps twice over, from treatment as common carriers").

[88] *Verizon*, 740 F.3d at 650 (citing *Cellco*, 700 F.3d at 538); *see also Cellco*, 700 F.3d at 545 ("[t]he Commission concedes that . . . it has no authority to treat mobile-data providers like Verizon as common carriers").

[89] *Data Roaming Order* ¶ 68 n.198 (emphasis in original).

Indeed, the D.C. Circuit rejected a facial challenge to the data roaming rules solely because it found that those rules could be interpreted to "differ materially from the kind of requirements that necessarily amount to common carriage."[90] The Commission has further made clear that the commercially reasonable standard does not include a "prescriptive regulation of rates," but instead grants "host providers appropriate discretion in the structure and level of such rates that they offer."[91] The commercially reasonable standard also necessarily allows for a *broader* range of marketplace rates than the "just and reasonable" ratemaking standard, which itself contemplates a range, or "zone," of acceptable rates.[92] And, the commercial reasonableness standard provides greater latitude in negotiations, allowing "greater flexibility and variation in terms and conditions."[93] Unlike common carriage regulation, the data roaming rules leave "substantial room for individualized bargaining and discrimination in terms."[94]

The Commission also took care to design the commercial reasonableness standard to preserve incentives for broadband investment. The Commission was acutely aware that data roaming obligations could create "the possibility that requesting providers will substitute roaming for investment in coverage and accordingly under-invest in deploying new infrastructure."[95] As Mr. Orszag explains, the Commission's concerns are well-grounded as a matter of economics, because if the rates or terms of roaming effectively permit it to be used as

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[90] *Cellco*, 700 F.3d at 547.

[91] *Data Roaming Order* ¶ 21.

[92] *Conway Corp.*, 426 U.S. at 278 ("there is no single cost-recovering rate, but a zone of reasonableness: [s]tatutory reasonableness is an abstract quality represented by an area, rather than a pinpoint" (quotation omitted)); 47 U.S.C. § 201.

[93] *Data Roaming Order* ¶ 78.

[94] *Cellco*, 700 F.3d at 548.

[95] *Data Roaming Order* ¶ 34; *see also id.* ¶ 21 n.76 (recognizing also that "there are pro-competitive benefits that flow from carriers differentiating themselves on the basis of coverage," and thus host providers may have a disincentive to invest in their networks if other providers can "free-ride" on their investment via roaming"); *see also id.* ¶¶ 16-22, 33-34.

resale, such roaming "would reduce incentives of facilities-based providers to build-out and upgrade their services," and in effect allow providers to "becom[e] *de facto* MVNO's by free-riding on roaming rates in regions in which investment costs are high."[96]

To address these concerns, the Commission expressly admonished that the data roaming obligations may not be used by requesting providers "as a backdoor way to create *de facto* mandatory resale obligations."[97] The Commission further made clear that roaming rates should ordinarily substantially exceed retail rates, because "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 carrier's network."[98] Indeed, the Commission has consistently rejected retail rates as a "benchmark" for evaluating the reasonableness of wholesale roaming rates.[99] And the Commission recognized that usage restrictions are commercially reasonable, explaining that "the terms and conditions offered by mobile data service providers . . . commonly include authorizing termination of service or other actions if a subscriber's roaming on other networks becomes too large a part of the subscriber's service use."[100]

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[96] Orszag Decl. ¶¶ 56-57 ("[f]ree-riding is a well-established phenomenon in economics describing a third party who benefits from resources, goods, and/or services without having to pay market rates for doing so").

[97] *Data Roaming Order* ¶ 88; *see also id.* ¶ 41 n.122 ("As we have stated in the past, however, roaming arrangements cannot be used as a backdoor way to create *de facto* mandatory resale obligations."); *id.* ¶ 34 ("we provide that the data roaming obligation does not create mandatory resale obligations").

[98] *Data Roaming Order* ¶ 21; *see also id.* ¶ 51 ("As discussed above, the relatively high price of roaming compared to providing facilities-based service will often be sufficient to counterbalance the incentive to scale back deployments in favor or relying on another provider's network.").

[99] *Voice Roaming Order* ¶ 40 n.102; *see also Voice Roaming Order on Reconsideration* ¶ 32 n.90 (fact that "roaming rates [are] *much higher* than retail rates" would preserve investment incentives).

[100] *Data Roaming Order* ¶ 21 (explaining that usage restrictions would make it unlikely for providers "to rely on roaming arrangements in place of network deployment as a primary source of their service provision"); *see also* Orszag Decl. ¶¶ 55-62 (discussing economic justification of restrictions on roaming use by requesting carrier and its individual subscribers). The Commission similarly made clear that "providers of commercial mobile data services are free to negotiate commercially reasonable measures to safeguard quality of service against network congestion that may result from roaming traffic or to prevent harm to their networks." *Data Roaming Order* ¶ 52.

Recognizing the unusual flexibility of the commercial reasonableness standard, the Commission has held that specific disputes are to be resolved "based on the totality of the circumstances," including but not limited to the seventeen factors enumerated in the *Data Roaming Order*.[101] As Mr. Orszag explains, these seventeen factors fall into three broad categories.[102] Some factors relate to the manner in which the parties have conducted negotiations,[103] but WCX has not alleged (nor could it) that AT&T has declined to negotiate in good faith. Other factors relate to technological compatibility,[104] but WCX concedes there are no issues of technical compatibility here.[105]

That leaves the remaining factors, which relate to marketplace considerations that determine the reasonableness of the offer. The *best* marketplace evidence of reasonableness, as the Commission has recognized, are the rates and terms that have already been negotiated at arm's length in the commercial marketplace. As discussed by Mr. Orszag, the Commission's reliance on "arm's length contract negotiations between providers" as the primary basis for reasonableness makes economic sense, because the terms and conditions agreed to by sophisticated parties reflect "market realities without requiring the Commission to try and quantify off the idiosyncratic factors that affect roaming" in every circumstance.[106] That is why the Commission has indicated that, in assessing the seventeen factors, it will apply a *presumption*

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[101] *Data Roaming Order* ¶¶ 74, 86.

[102] Orszag Decl. ¶ 30 (discussing the Commission's evaluation of (i) "negotiating factors," (ii) "competitive factors," and (iii) "technical factors").

[103] *Id.* ("*Negotiation Factors*: how the host provider has responded to the request for negotiation (e.g., potential stonewalling, unreasonable offers); whether the parties have or have had any roaming arrangements (and the terms of such agreements)").

[104] *Id.* ("*Technical Factors*: technological compatibility and feasibility; whether changes to the host network are necessary to accommodate the request").

[105] *See* WCX Legal Analysis (Compl. at 269 n.99) ("WCX and AT&T are technologically compatible and there are no generational differences," and "[t]o date there do not appear to be technical feasibility issues").

[106] Orszag Decl. ¶¶ 21, 28, 30.

that signed marketplace agreements are commercially reasonable.[107] When rates and terms are directly observable in the marketplace (as they are here), and broadband data providers are competing successfully in reliance on those rates and terms (which is also the case), then any offer that is generally consistent with such rates and terms would be "commercially reasonable" within the meaning of the Commission's rule.[108]

WCX ignores all of this. Instead, under the pretense that the Commission "has not ever explicated an actual legal definition of commercial reasonableness,"[109] it offers its own "test" out of thin air. WCX begins by quoting *Black's Law Dictionary* as defining "commercially reasonable" as "'conducted in good faith and in accordance with commonly accepted commercial practice.'"[110] As explained above, however, the Commission's standard does exactly that—in particular, by looking to the range of rates and terms that have already been negotiated at arm's length in the marketplace, which are presumed to be reasonable.[111]

WCX further suggests, however, that the Commission should assess whether AT&T would be "fairly compensated" and whether AT&T's proposed rates would prevent "WCX from competing in the market."[112] In fact, WCX's economic expert, Dr. Martyn Roetter, explicitly

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[107] *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.").

[108] *Data Roaming Order* ¶¶ 81, 86; *accord Matthews*, 642 F.3d at 572 ("A willingness to pay is an indication of commercial reasonableness.").

[109] WCX Legal Analysis (Compl. at 268).

[110] *Id.*

[111] WCX also asserts that courts interpreting the phrase "commercially reasonable" as it may appear in *contracts* have generally treated the meaning of the term as a fact-dependent inquiry. *Id*. (Compl. at 268 & n.98). Of course, the Commission has already held that disputes about commercial reasonableness will be treated as fact-dependent inquiries based on the *Data Roaming Order*'s non-exclusive list of seventeen factors, which in this context includes reference to the rates and terms in presumptively reasonable marketplace agreements.

[112] *Id.* at 268-69.

advocates a test under which the Commission would determine whether the proposed rates "allow[ ] a reasonable profit margin on the roaming services."[113] But any such inquiry would clearly constitute cost-based ratemaking that would push the Commission's data roaming regime over the line into prohibited common carrier regulation. As previously noted, the Commission expressly rejected any "prescriptive regulation of rates,"[114] and the commercial reasonableness standard is not based on a "cost recovery standard or a reasonable rate of return standard."[115] Consequently, WCX's proposed standard cannot be squared with the *Data Roaming Order*, and indeed, its focus on specific rate levels and whether such rates would allow either AT&T or WCX to earn a "profit" on the services at issue are the hallmarks of the just and reasonable ratemaking standard governing common carriage.[116]

Finally, WCX's contention that it can deal only with AT&T because AT&T "controls the only ubiquitous LTE network compatible with WCX technology," and that this should affect the Commission's application of the commercially reasonable standard, is simply incorrect.[117] As Mr. Prise explains, devices that operate on multiple spectrum bands are now ubiquitous in the marketplace,[118] and as the Commission has noted, "requesting providers that operate on different bands or technologies than the host might achieve technological compatibility by providing subscribers with multi-band and multi-mode user devices."[119] In this instance, there are multiple

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[113] Roetter Non-Conf. Decl. (Compl. at 158).

[114] *Data Roaming Order* ¶ 21.

[115] Orszag Decl. ¶ 28.

[116] Dr. Roetter acknowledges that consistency with "the terms and conditions in roaming agreements between other operators that have been found to be mutually satisfactory" supports a finding of commercial reasonableness. Roetter Non-Conf. Decl. (Compl. at 158). Dr. Roetter, however, never applies that factor to AT&T's proposal or the RWA Model Agreement.

[117] Am. Compl. ¶ 50.

[118] Prise Decl. ¶¶ 3, 9-11.

[119] *Data Roaming Order* ¶ 46.

providers that are able to provide the necessary data roaming services that WCX requires.[120] The existence of multiple alternative providers refutes WCX's argument that a roaming agreement with AT&T is a "fundamental 'must-have'" for WCX.[121]

II. WCX'S CLAIM UNDER RULE 20.12(E) FAILS BECAUSE AT&T HAS OFFERED WCX DATA ROAMING ON COMMERCIALLY REASONABLE RATES AND TERMS

The data roaming rules require AT&T to offer WCX a roaming agreement with commercially reasonable rates and terms.[122] AT&T easily satisfies this standard. The rates AT&T has proposed are well within, and indeed are at the low end, of the range of rates that prevail in existing marketplace agreements. AT&T also has proposed limits on usage that are designed to prevent the roaming arrangement from becoming a *de facto* resale arrangement, with additional terms to enforce those limitations, and those terms, too, are commonplace throughout AT&T's numerous agreements with other wireless providers in the industry and plainly reasonable.

WCX's position, by contrast, is that the Commission's data roaming rules somehow obligate AT&T to offer a radically more one-sided set of rates and terms. WCX insists that AT&T must offer and provide: (i) sub-penny rates that are below retail rates and that are far below the entire range of wholesale rates found in actual marketplace agreements that under the Commission's data roaming rules are *presumptively* reasonable; (ii) a provision under which WCX would "endeavor" to limit its roaming to less than 50% of its overall traffic, but which on its face would permit WCX to offer all of its wireless services via AT&T's network without penalty; (iii) no terms or conditions that would permit AT&T to enforce any restrictions on

[120] Prise Decl. ¶¶ 3-4; Orszag Decl. ¶¶ 42-48 ("I find no technological constraint that would limit WCX to AT&T as the only possible roaming partner").

[121] Am. Compl. ¶ 6.

[122] 47 C.F.R. § 20.12(e)(1).

usage; and (iv) these terms in *perpetuity*. WCX's proposals are clearly inconsistent with the *Data Roaming Order*, and would, in reality, rewrite those rules in ways that would undermine the Commission's policies to promote broadband investment. Indeed, even a moment's reflection confirms that WCX's proposal is so radically one-sided in its favor that no reasonable data provider would ever accept such terms as a "commercially reasonable" arrangement.

For present purposes, however, the only question in this case is whether *AT&T's* proposal is commercially reasonable. Even if WCX's proposal was also commercially reasonable—and it plainly is not—AT&T would still be in compliance with the *Data Roaming Order* so long as AT&T had made a commercially reasonable offer on which it was willing to negotiate. 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."[123] The Commission has explained that "the standard of commercial reasonableness" is expected "to accommodate a variety of terms and conditions in data roaming,"[124] and "allows *host providers to control the terms and conditions of proffered data roaming arrangements*, within a general requirement of commercial reasonableness."[125] Because AT&T's proposal to WCX was and is "commercially reasonable," WCX's claims here fail; the data roaming rules do not require AT&T to "accept WCX's proposed terms, conditions and prices,"[126] even if they were also commercially reasonable.

[123] 47 C.F.R. § 20.12(e)(1).

[124] *Data Roaming Order* ¶ 81.

[125] *Id.* ¶ 33 (emphasis added).

[126] Am. Compl. ¶ 41.C.

A. AT&T'S PROPOSED DATA ROAMING RATES ARE COMMERCIALLY REASONABLE

AT&T's proposed rates are plainly commercially reasonable, because they are consistent with—and indeed, at the low end—of the prevailing marketplace rates for wholesale roaming. AT&T's proposals are drawn directly from "the market rates for data roaming service as established by dozens of data roaming agreements AT&T has entered into with other wireless [providers]."[127] AT&T proposed a rate of [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] for LTE data roaming service,[128] which is the same rate AT&T charges in its existing roaming agreements for LTE-based data roaming.[129] In fact, AT&T has entered into dozens of roaming agreements and is a net payor under those agreements, and yet "AT&T's proposed roaming rates [to WCX] are 'significantly below the average rates [AT&T is currently] *paying* to its domestic partners."[130] On average, AT&T has paid [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] for roaming on other providers' networks and charged [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] to operators roaming on AT&T's network.[131] Other carriers, such as T-Mobile, have stated that they paid "$0.30 per MB in 2013" and "forecasted an average rate of $0.18 per MB" for 2014.[132] These data further support the conclusion that the "roaming rates in the *AT&T Proposed Agreement* are consistent with roaming rates negotiated on an arm's length basis."[133]

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[127] Meadors Decl. ¶ 47.

[128] *Id*., Ex. 5 (AT&T proposal), Ex. 8 § 2.

[129] Orszag Decl. ¶ 51 & Appx. C (Tbl. C-2) (in each of "AT&T's current roaming agreements [that] specify rates for LTE-based data roaming, . . . the LTE roaming rate is [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL], which is exactly the rate AT&T offered to WCX").

[130] *Id.* (emphasis added).

[131] *Id*. ¶ 54.

[132] *Id*. ¶ 56.

[133] *Id* (emphasis in original).

That should be the end of the matter. The Commission has explained that in assessing commercial reasonableness, it would look to determine "whether the providers involved have had previous data roaming arrangements with similar terms," and it would "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."[134] Consequently, the fact that AT&T's proposed rates are in line with what numerous sophisticated marketplace providers have accepted in existing data roaming agreements provides conclusive evidence that AT&T's proposed rates are commercially reasonable.[135] Indeed, in claiming that AT&T's proposal violates the Commission's rules, WCX is necessarily suggesting that both AT&T and all of its roaming partners have proposed and agreed to pay wholesale rates that are "commercially unreasonable"—a proposition that is absurd on its face. The data roaming rules manifestly do not *require* AT&T to offer rates that are below the entire range of observable marketplace rates, and even WCX's expert Dr. Roetter acknowledges that "terms and conditions in roaming agreements between other operators that have been found to be mutually satisfactory" support a determination of "commercial reasonableness."[136]

WCX does not dispute that AT&T's proposed rates are well within the range of rates charged and paid by AT&T and other providers. WCX argues instead that "the Commission can and should use the prevailing retail rate as the benchmark for the roaming price."[137] The Commission has been quite clear that roaming rates that are at or below retail rates would *undermine* the Commission's broadband policies because they would encourage providers to use

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[134] *Data Roaming Order* ¶¶ 81, 86.

[135] Orszag Decl. ¶ 49 ("arm's length agreements meet a standard that both parties found to be in their mutual self-interest").

[136] Roetter Non-Conf. Decl. (Compl. at 158).

[137] WCX Legal Analysis (Compl. at 282); *see also* Am. Compl. ¶ 92 (AT&T's "proposed roaming rate" is commercially unreasonable because it "far exceeds [AT&T's] prevailing retail rate for LTE data services").

roaming as resale and as a substitute for broadband investment.[138] As explained above, the Commission has stated that it expects roaming rates to be "much higher than retail rates,"[139] which is necessary to "counterbalance the incentive" to "rely[] on another provider's network."[140] As Mr. Orszag explains, "the requirement to share facilities" at "rates below what would occur in an arm's length negotiation" creates doubly harmful incentives, because it would both "reduc[e] the incentive for the potential competitor to invest in the relevant input for itself and also for the sharing provider to make further investments in its own facilities."[141]

WCX also claims that, unless AT&T offers wholesale roaming rates at or below retail rates, WCX will not be able to offer "competitively priced retail services with national coverage."[142] WCX has submitted no evidence to substantiate this claim. AT&T has dozens of data roaming agreements with rural and small providers that contain rates above retail rates, and there is no evidence that such rates make these providers' services unsustainable.[143] Moreover, as Mr. Orszag shows, "rural carriers that have signed agreements with AT&T (and T-Mobile), at much higher roaming rates than what WCX proposes here, have continued to invest in upgrading their networks and in expanding the services they offer to their customers."[144] But of course,

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[138] *Voice Roaming Order on Reconsideration* ¶ 32 n.90*; Voice Roaming Order* ¶¶ 37-40.

[139] *Voice Roaming Order on Reconsideration* ¶ 32 n.90.

[140] *Data Roaming Order* ¶ 51; *see also id.* ¶ 21 ("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 carrier's network"); *Voice Roaming Order* ¶¶ 36-40 (specifically rejecting cap "based on some benchmark of retail rates").

[141] Orszag Decl. ¶ 86; *see also Data Roaming Order* ¶ 21 ("the pro-investment incentives that providers will have as a consequence of the high cost of roaming are reflected in the terms and conditions offered by mobile data service providers" which makes it "unlikely" that providers would "rely on roaming arrangements in place of network deployment as the primary source of their service provision.").

[142] WCX Legal Analysis (Compl. at 283).

[143] Orszag Decl. ¶ 89; *see id.* ¶ 88 ("WCX does not present any analysis to show that any data roaming rate above retail rates would make WCX unsustainable, nor does it present any analysis to show that data roaming rates at or below retail rates are necessary to achieve widespread availability of competitive wireless services, or that such rates would ensure proper incentives for facilities-based investments"). Similarly, WCX's expert "Dr. Roetter has not performed any reliable analysis to show that roaming rates exceeding retail rates would harm consumers." *Id.* ¶ 93.

[144] Orszag Decl. ¶ 89.

these providers are using their agreements with AT&T only for *roaming*. By contrast, WCX's business model—which envisions national access to AT&T's network at rates at or below retail with no restrictions on how much of WCX's overall traffic can be offered via AT&T's network—is plainly resale, not roaming. The Commission fully intended for commercially reasonable roaming rates to preclude the viability of any business model that would use roaming as "backdoor . . . resale," because such arrangements would discourage broadband investment.[145]

WCX's remaining arguments are also meritless. For example, WCX claims that AT&T is quoting the Commission "out of context" when it notes that the Commission expected roaming rates to be substantially higher than retail rates.[146] Not so. First, the *Data Roaming Order* itself is very clear that the "the relatively high price of [*data*] roaming compared to providing facilities-based service" is necessary to "counterbalance the incentive to 'piggy back' on another carrier's network."[147] WCX's argument, on the other hand, focuses solely on the reconsideration order in the *voice* roaming proceeding, and it argues that when the Commission there said that roaming rates would be "much higher than retail rates," the Commission was "discussing the price for *home* roaming rates" only.[148] In fact, the Commission expressly rejected any price caps "based on some benchmark of retail rates" in the original *Voice Roaming Order*, before it even adopted a home roaming requirement.[149] Specifically, the Commission explained that a retail rate price cap or benchmark would "deter investment in network deployment by impairing

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[145] *Data Roaming Order* ¶ 41 n.122.

[146] WCX Legal Analysis (Compl. at 282).

[147] *Data Roaming Order* ¶ 21.

[148] WCX Legal Analysis (Compl. at 282) (emphasis in original); *see Voice Roaming Order on Reconsideration* ¶ 32 n.90 (mandatory roaming should not deter facilities investment because roaming rates are expected to be "much higher than retail rates").

[149] *Voice Roaming Order* ¶¶ 36-40. The Commission's rejection in the *Voice Roaming Order* of a price cap or benchmark "based on larger carriers' retail rates" was not limited to rates for "home roaming" because the Commission, in the *Voice Roaming Order*, concluded that the "*roaming obligation does not include an in-market or home roaming requirement*." *Id.* ¶ 48 (emphasis added).

buildout incentives facing both small and large carriers," and "tend to diminish smaller carriers' incentives to expand the geographic coverage of their networks."[150] The Commission further explained that tying roaming rates to retail rates could diminish the incentive for providers to "lower retail prices . . . and perhaps even give [providers] an incentive to raise retail rates."[151] The Commission also reaffirmed its rejection of "retail rates" in the *Voice Roaming Reconsideration Order*,[152] and again in the *Data Roaming Order*.[153]

In addition, WCX is quite explicitly asking for a "prescription" of its own proposed rate (specifically, the $0.0096 per MB rate as found in the RWA Model Agreement).[154] Any such "prescription" would be unlawful for two reasons. First, WCX offers no evidence that its proposed rate has ever been accepted in the commercial marketplace in an agreement reached through arm's length negotiations. To AT&T's knowledge, the RWA Model Agreement has never been the basis of a data roaming agreement between wireless carriers. That is not surprising because WCX proposed rates "are far outside the range of commercially negotiated rates that are presumptively commercially reasonable."[155]

More fundamentally, however, WCX's argument that AT&T's rates should be judged against a retail rate benchmark would move the data roaming regime over the line into prohibited

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[150] *Id.* ¶ 40.

[151] *Id.* ¶ 39.

[152] *Voice Roaming Order on Reconsideration* ¶ 32 & n.92 (citing *Voice Roaming Order* ¶¶ 36-40),

[153] *Data Roaming Order* ¶ 21 (citing *Voice Roaming Reconsideration Order* ¶ 32). Even if reference to "retail rates" were appropriate, "WCX's proposed rate is not the 'prevailing retail rate.'" Meadors Decl. ¶ 75. Indeed, AT&T's customers can choose "from a range of data plans in which the price per gigabyte varies with the size of the data plan purchased," and most wireless carriers take a similar approach to data plans. *Id*. As explained by Mr. Orszag, "WCX's proposed rate does not properly reflect current retail rates for data." Orszag Decl. ¶ 97. For example, WCX ignores that "retail pricing" (i) is "complex and nonlinear," (ii) depends on "data usage and the chosen plan," (iii) includes fixed monthly charges, (iv) is based on the volume of data purchased, or part thereof, and (v) reflects "numerous retail rates in the marketplace." *Id*. ¶¶ 98, 101.

[154] Am. Compl. ¶ 94(h).

[155] Orszag Decl. ¶ 80.

Title II common carrier regulation. WCX's retail rate benchmark would eliminate most of the negotiating freedom that providers rely on today because WCX is proposing a single rate benchmark that is radically lower than the rate that scores of sophisticated parties have actually negotiated in the marketplace and that, under the current rules, presumptively are commercially reasonable.[156] Such a ruling would transform the private carriage "commercial reasonableness" standard into a common carrier regime of rate regulation based on WCX's proposal for what it believes to be a "reasonable" rate. Any purported difference between the "commercially reasonable" and "just and reasonable" standards would become mere "smoke and mirrors."[157] Accordingly, WCX's objection that AT&T's proposal does not track AT&T's retail rates is contrary to the marketplace discretion and flexibility that the D.C. Circuit found essential to the legality of the Commission's *Data Roaming Order*.

B. AT&T'S RESTRICTIONS ON RESALE AND ROAMING ARE COMMERCIALLY REASONABLE

AT&T's proposal also contains limitations on the scope of usage under the agreement to prevent backdoor resale. AT&T's proposed limitations are plainly commercially reasonable, because they are derived from numerous existing marketplace agreements and are consistent with the express findings of the *Data Roaming Order*.

AT&T's proposal contains two principal restrictions. First, AT&T's proposed agreement provides that [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[158] This is a common provision that is found in all of AT&T's data roaming agreements with other wireless

[156] *Data Roaming Order* ¶ 81.

[157] *Cellco*, 700 F.3d at 548.

[158] Meadors Decl., Ex. 5 (AT&T proposal) § 11(b).

providers.[159] The commercial purpose of this provision is to "prevent both traditional and 'backdoor' resale—i.e., a wireless carrier's use of a roaming agreement to sell services to customers residing outside of its network area."[160] A contract provision prohibiting resale is clearly commercially reasonable under the data roaming rules, because the Commission expressly held that the data roaming obligations may not be used by requesting providers "as a backdoor way to create *de facto* mandatory resale obligations."[161] Indeed, the inclusion of a provision addressing "backdoor resale" is especially reasonable here, where the requesting provider (WCX) "has made clear that 'significant roaming . . . is essential' to its business plans."[162]

Second, AT&T's proposal also provides that [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[163] AT&T's proposal also specifies that [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[164] These provisions are designed to

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[159] Meadors Decl. ¶ 49; Orszag Decl. ¶ 62 (explaining that AT&T's proposal [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]).

[160] Meadors Decl. ¶ 49.

[161] *Data Roaming Order* ¶ 88; *see also id.* ¶ 41 n.122 ("As we have stated in the past, however, roaming arrangements cannot be used as a backdoor way to create *de facto* mandatory resale obligations."); *id.* ¶ 34 ("we provide that the data roaming obligation does not create mandatory resale obligations").

[162] Meadors Decl. ¶ 39 (citing Am. Compl. ¶ 50).

[163] Meadors Decl., Ex. 5 (AT&T proposal) § 11(a); *id.* ¶ 52 [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].

[164] Meadors Decl., Ex. 5 (AT&T proposal) § 11(b); *id.* ¶ 52 [BEGIN CONFIDENTIAL] [redacted]

ensure "that parties do not offer wholesale or retail services that are primarily designed to operate on the other party's network (*i.e.*, resale)"[165] or "market services to customers located outside of its licensed area and effectively engage in resale."[166] And, these types of restrictions are found in a number of data roaming agreements between AT&T and other wireless providers,[167] and apply *bilaterally* to AT&T and to its roaming partners.[168] These usage limitations are, again, plainly commercially reasonable, because they implement the Commission's express holding that "roaming arrangements cannot be used as a backdoor way to create *de facto* resale obligations,"[169] given that such resale "would reduce incentives of facilities-based providers to build out and upgrade their facilities."[170]

As with AT&T's proposed rates, WCX does not dispute that these provisions are common in scores of marketplace data roaming agreements. Instead, its principal argument is that the residents in its relatively rural home service area will likely want to roam in nearby cities, and therefore AT&T's proposed limitations [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] are too constricting.[171] WCX's stated concern, even if valid, does not make AT&T's offer commercially unreasonable, for several reasons.

First, WCX has never tried to negotiate these terms with AT&T within any reasonable range of modifications; indeed, WCX refused to use the AT&T proposal as even a starting point

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[redacted] [END CONFIDENTIAL] *See* Meadors Decl., Ex. 5 (AT&T proposal) § 1.

[165] Orszag Decl. ¶ 60.

[166] Meadors Decl. ¶ 53.

[167] *Id.* ¶¶ 52, 53.

[168] Orszag Decl. ¶ 63.

[169] *Data Roaming Order* ¶ 41 n.122.

[170] Orszag Decl. ¶ 58.

[171] Am. Compl. ¶ 59; WCX Legal Analysis (Compl. at 279-81).

for negotiations.[172] Nor does WCX offer any evidence here to substantiate its claims concerning the likely roaming patterns of its customers. In agreements with other providers, AT&T has been willing to make reasonable adjustments to its usage limitations. That being said, the offer that AT&T has made is certainly commercially reasonable and consistent with standard industry agreements.

By contrast, WCX's position regarding usage restrictions, which has actually increased from [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] to 50% (in 2014), is not reasonable and has prevented any such negotiations.[173] Indeed, WCX appears to reject entirely the Commission's concern that roaming can become *de facto* resale without appropriate restrictions,[174] and claims 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."[175] WCX's position would turn the *Data Roaming Order* on its head. As Mr. Orszag notes, "WCX's reliance on the technical aspects of a roaming arrangement—rather than the economic nature and implications of the transaction—ignores the Commission's goal of preventing roaming from being employed as *de facto* resale."[176] WCX is essentially arguing that AT&T is obligated to offer "roaming" that would as a practical matter open its network for nationwide resale, but the *Data Roaming Order* gives AT&T every right to propose terms that preclude WCX from marketing its business to subscribers with little or no

[172] *See* Meadors Decl. ¶ 31.

[173] *Id.* ¶ 52.

[174] *See Data Roaming Order* ¶ 41 n.122.

[175] Feldman Decl. ¶ 19 (Compl. at 52).

[176] Orszag Decl. ¶ 107.

connection to WCX's service territory "on the back of AT&T's hundred-plus billion dollar investment in its wireless network."[177]

Moreover, even if it were true that WCX's in-region customers might engage in legitimate roaming that exceeded AT&T's proposed [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] thresholds—and WCX has not substantiated any such claim—it does not follow that AT&T's proposed terms would constrain WCX's ability to serve those customers. AT&T's proposed agreement only limits WCX's ability to roam on *AT&T's* network; WCX has many other potential roaming partners in the areas surrounding its service territory. As explained above, given the availability of multi-band LTE devices today, WCX is free to enter into multiple roaming agreements and spread its roaming traffic across multiple networks, just as AT&T, T-Mobile and others do.[178] Accordingly, AT&T's proposed terms promote the Commission's broadband policies and maintain appropriate investment incentives while still leaving WCX enough latitude to accommodate its customers legitimate roaming needs through the use of multiple agreements. Similarly, to the extent that WCX is suggesting that CMA 667 does not adequately capture the true service area of its customers, it can do what other wireless providers routinely do in that situation—it can secure resale agreements to serve those adjacent cities.

The extreme nature of WCX's position is further highlighted by the specific nature of WCX's proposed resale restrictions, which commits the parties merely to "*endeavor* to provide the majority of its customers' mobile Data Services on its own Network."[179] Such a term on its face would facilitate *de facto* resale on a massive, nationwide scale and thus cannot be

[177] Meadors Decl. ¶ 84.

[178] *See* Prise Decl. ¶¶ 3, 9-11.

[179] *See* Meadors Decl. ¶¶ 73-74.

"commercially reasonable." WCX's proposed agreement does not define the term "endeavor" but it generally means merely "to make an effort."[180] Accordingly, WCX's proposed terms effectively would permit WCX to provide 100% of its traffic via AT&T's network anywhere in the country. To be sure, WCX must *try* to keep its traffic within the 50% limitation, but if it "fails" to do so there are no consequences under the contract.[181] It would be difficult to conceive of a contract provision more nakedly designed to undermine the Commission's admonition that the data roaming obligations may not be used by requesting providers "as a backdoor way to create *de facto* mandatory resale obligations."[182]

C. THE PROVISIONS THAT ALLOW AT&T TO ENFORCE ITS RIGHTS AND PROTECT ITS NETWORK FACILITIES UNDER THE CONTRACT ARE COMMERCIALLY REASONABLE

WCX also challenges a number of AT&T's proposed terms that are designed to enforce AT&T's contractual rights and protect its investment in broadband facilities.[183] These provisions are clearly commercially reasonable, and indeed, they are standard in data roaming arrangements. The need for such safeguards is especially important here, given that AT&T has had to litigate claims in the past against entities controlled by WCX's CEO, Mr. Feldman.[184]

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[180] *Webster's II New Riverside University Dictionary* at 431 (1984).

[181] *See* Meadors Decl. ¶ 83.

[182] *Data Roaming Order* ¶ 88; *see also id.* ¶ 41 n.122 ("As we have stated in the past, however, roaming arrangements cannot be used as a backdoor way to create *de facto* mandatory resale obligations."); *id.* ¶ 34 ("we provide that the data roaming obligation does not create mandatory resale obligations"). The same analysis applies to WCX's position that "[t]here should be no limitations to any individual account." Am. Compl. ¶ 51. Under WCX's proposal, a WCX subscriber could obtain 100% of the subscriber's broadband data service by roaming exclusively on AT&T's broadband facilities. In that circumstance, WCX's proposal would allow WCX to subscribe to AT&T's broadband facilities and then reoffer AT&T's service to WCX subscribers anywhere in the country, even if they have no connection to WCX's service area, all based on WCX's data roaming arrangement with AT&T. That arrangement is impermissible "resale."

[183] Am. Compl. ¶¶ 70-91.

[184] Meadors Decl. ¶ 65 & n.107.

The specific terms challenged by WCX are: (i) the audit provision;[185] (ii) the provision allowing for suspension during dispute resolution;[186] (iii) the [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] dispute resolution provision;[187] (iv) AT&T's "implicit" build-out requirement;[188] and (v) "[a]ny AT&T surveillance of WCX users' content or applications."[189] None of WCX's arguments undermine the commercial reasonableness of AT&T's proposal. Indeed, the omission of one or more of these critical protections would undermine the Commission's broadband investment policies, because the agreement otherwise would give WCX free reign to commandeer AT&T's facilities to attract customers from across the country and transform AT&T's roaming offer into resale without penalty.

1. Audit Provision (Section 11(c))

AT&T has proposed a term that [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[192]

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[185] Am. Compl. ¶¶ 76-77

[186] *Id.* ¶¶ 74-75;

[187] *Id.*. ¶¶ 71-73.

[188] *Id.* ¶¶ 78-79.

[189] *Id.* ¶¶ 88-91.

[190] *See* Meadors Decl., Ex. 5 (AT&T proposal) § 11(c).

[191] *Id.*

[192] *Id.*

AT&T's audit provision is commercially reasonable. The audit provision here was included "to avoid the expense and inconvenience of further dispute resolution," to safeguard the quality of service that AT&T provides on its network, to protect AT&T's network from harm, and to ensure that WCX would comply with the terms of the data roaming agreement.[193] As explained by Mr. Meadors, audit rights "are often found in commercial roaming agreements," and neither WCX nor its expert Dr. Roetter claims otherwise.[194]

From AT&T's perspective, an audit provision is especially warranted in these circumstances given AT&T's prior experience with companies led or controlled by Mr. Feldman, which have involved litigation of payment disputes and resulting losses to AT&T.[195] WCX can hardly complain about the reasonableness of AT&T's proposal, because it [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]. WCX nevertheless argues that AT&T could use the audit provision for improper purposes or to manufacture violations where none exist, but that claim is unfounded considering that the audit provision [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[196] Further, if WCX has more specific concerns regarding the audit provision, AT&T was and is willing to negotiate on those points, but WCX never disputed the audit provision during the negotiations with AT&T.[197]

2. Suspension and Termination of Service (Sections 17 and 20)

Section 17(a) of the AT&T Proposal [BEGIN CONFIDENTIAL] [redacted]

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[193] *Id.*

[194] Meadors Decl. ¶ 65.

[195] *Id.*

[196] *Id.*

[197] *Id.* ¶ 67.

[END CONFIDENTIAL] and Section 17(b) [BEGIN CONFIDENTIAL] [END CONFIDENTIAL].[198] In turn, Section 20 of the AT&T proposal [BEGIN CONFIDENTIAL] [END CONFIDENTIAL].[199]

These provisions, too, are commercially reasonable. Suspension and termination provisions are "standard contract terms and conditions providing the types of protections that wireless carriers expect to find in data roaming agreements" and "similar provisions appear in all of AT&T's dozens of data roaming agreements with other wireless carriers."[200] Such provisions are necessary to protect AT&T's network from congestion or harm and to enforce AT&T's contractual rights under the agreement, and the Commission has expressly recognized the reasonableness of such terms.[201] Indeed, the Commission has noted with approval that "providers already commonly include in their negotiated roaming agreements terms that give a host provider the ability to suspend roaming service if roaming becomes impractical for reasons such as overload, outage, or other operational or technical issues,"[202] as well as terms "authorizing termination of service or other actions if a subscriber's roaming on other networks becomes too large a part of the subscriber's service use."[203]

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[198] *See* Meadors Decl., Ex. 5 (AT&T proposal) § 17.

[199] *Id.* § 20.

[200] Meadors Decl. ¶ 70.

[201] *Data Roaming Order* ¶ 52.

[202] *Id.* ¶ 85 n.242.

[203] *Id.* ¶ 21.

WCX argues that these terms are unreasonable because they deny WCX "notice or any other due process," that "AT&T would have the incentive to suspend early and often," and that WCX "likely [would] not survive" such events.[204] These assertions are unfounded. WCX identifies no circumstance when AT&T "has been found to have engaged in such conduct."[205] In any event, WCX will have notice, because under AT&T's proposal, [BEGIN CONFIDENTIAL] [END CONFIDENTIAL].[206] Likewise, Section 14(a) [BEGIN CONFIDENTIAL] [END CONFIDENTIAL].[209] In sum, suspension and termination would not occur without notice or process.[210]

3. **Dispute Resolution –** [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] **Arbitration (Section 23(b))**

Section 23(b) provides that [BEGIN CONFIDENTIAL]

[204] Am. Compl. ¶ 75; *see also* Roetter Conf. Decl. (Compl. at 197).

[205] Meadors Decl. ¶ 72.

[206] *See* Meadors Decl., Ex. 5 (AT&T proposal) § 14.

[207] *Id.*

[208] *Id.* §20(b)

[209] *Id.* §17(c)

[210] Here too, if WCX has specific concerns about the suspension and termination provisions, AT&T would be willing to discuss specific suggestions from WCX. *See* Meadors Decl. ¶ 72.

[END CONFIDENTIAL].[211] WCX argues that this provision is commercially unreasonable because it "would operate to prevent any FCC oversight or ability to weigh in on a dispute over roaming on a going forward basis [and would] unreasonably frustrate the Commission's goals and policies, and would unlawfully restrict the FCC's jurisdiction over interstate communications by wire."[212] WCX likewise objects to "any term in any agreement that would strip the Commission and/or the courts of their lawful jurisdiction in favor of private dispute resolution."[213]

The proposed provision is commercially reasonable. As explained by Mr. Meadors, mandatory arbitration provisions "are found in countless commercial contracts" and are clearly commercially reasonable.[214] Indeed, the RWA Model Agreement that WCX sent to AT&T on June 24, 2014, also provided for mandatory arbitration under the American Arbitration Association rules; only later did WCX revise that provision to permit, but not require, arbitration.[215] Moreover, contrary to WCX's argument, the Commission lacks jurisdiction over simple breach of contract disputes and therefore a mandatory arbitration provision would not deprive the Commission of any jurisdiction it currently holds.[216] Thus, WCX appears to be seeking to preserve the ability to seek Commission review over routine contractual terms, even though the Commission has sought to "discourage frivolous claims regarding the reasonableness

[211] *See* Meadors Decl., Ex. 5 (AT&T proposal) § 23(b)

[212] Am. Compl. ¶ 73.

[213] *Id.*

[214] Meadors Decl. ¶ 65.

[215] *Id*. ¶ 64.

[216] *Id*.

of the terms and conditions in a signed agreement."[217] In all events, the Commission has addressed this issue directly, explaining that although it would not mandate such terms, 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." [218] AT&T's arbitration provision is thus commercially reasonable.

4. Build-Out Requirements (No Provision Cited)

Without challenging any particular provision, WCX argues that "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."[219] It contends that if "AT&T is attempting to overrule the FCC'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," then such provisions "represent a prohibited collateral attack on the Commission's build-out rules."[220] This argument is baseless. AT&T's proposed contract [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL], let alone requirements that differ from those imposed by the Commission.

5. Network Monitoring/Privacy (No Provision Cited)

AT&T's proposal also states that [BEGIN CONFIDENTIAL] [redacted]

[217] *Data Roaming Order* ¶ 81.

[218] *Id.* ¶ 83.

[219] Am. Compl. ¶ 79.

[220] *Id.*

[END CONFIDENTIAL].[223] Accordingly, AT&T's ability to suspend service under Section 17(a) is commercially reasonable.[224]

III. WCX'S REMAINING CLAIMS SHOULD BE REJECTED

WCX also contends that AT&T has violated a series of statutory provisions in addition to Rule 20.12 of the Commission's Rules.[225] First, WXC argues that AT&T also must satisfy the "automatic roaming" standards under the Communications Act, including Sections 201, 202 and 332.[226] Second, without providing any legal argument, WCX claims that AT&T has violated other statutory provisions identified in its Complaint, including Sections 157(a), 254, 301 and

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[221] *See* Meadors Decl., Ex. 5 (AT&T proposal) § 17(a).

[222] Am. Compl. ¶¶ 61-63.

[223] *See Data Roaming Order* ¶ 85 n.242.

[224] To the extent that WCX contends that AT&T's proposal fails to address privacy concerns of WCX subscribers while roaming on AT&T's network, WCX Legal Analysis (Compl. at 277), that argument is mistaken because AT&T [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]. *See* Meadors Decl., Ex. 5 (AT&T proposal), Ex. 4.1 § 1.6 Data Privacy; *id.* Exh. 4.2, LTE Wireless Services, § 1.6 Data Privacy. Further, WCX has never articulated any concerns with respect to AT&T's privacy policy. Meadors Decl. ¶ 69.

[225] Am. Compl. ¶ 41.

[226] *See* WCX Legal Analysis (Compl. at 269-275).

1302.[227] As shown below, common carrier obligations do not apply to AT&T's provision of data roaming, and the remaining statutes identified by WCX do not state a claim against AT&T.

A. DATA ROAMING IS NOT SUBJECT TO TITLE II COMMON CARRIER OBLIGATIONS

WCX argues that AT&T's provision of data roaming services is actually governed by Title II and the common carrier obligations of the *voice* roaming rules. This is so, WCX argues, because WCX is planning to use AT&T's LTE data roaming services in some instances as "an input to interconnected service" that *WCX* would provide to its own customers.[228] According to WCX, "WCX's subscribers have the capability to communicate to or receive communication from all other users on the public switched network," "have regular phone numbers, and can call and be called from all other subscribers on the public switched network."[229] Thus, according to WCX, "the scope of AT&T's duties, and the applicable legal standard, [are] determined from an end-user perspective, not from the perspective of the wireless provider supplying roaming-based network connectivity."[230] WCX thus contends that "[i]f a WCX user is roaming on AT&T's LTE network and makes a telephone call, then AT&T is providing 'automatic roaming' not 'commercial mobile data service roaming'" and that "is so even if AT&T never knows that it occurred."[231]

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[227] Am. Compl. ¶ 41.

[228] WCX Legal Analysis (Compl. at 269-75). *See also* Am. Compl. ¶ 41(B) (AT&T failed to "offer terms, conditions and prices for 'automatic roaming' to support 'interconnected voice and data' and text-messaging that are reasonable and not unreasonably discriminatory under §§ 201, 202 and 332 as well as Rule 20.12(a)(2) and (d)"); *id.* ¶ 41(D) (AT&T failed to "accept reasonable and not unreasonably discriminatory terms, conditions and prices that would allow 'automatic roaming' to support 'interconnected voice and data' and text-messaging that meet the requirements of §§ 201, 202 and 332 as well as Rule 20.12(a)(2) and (d)").

[229] WCX Legal Analysis (Compl. at 270).

[230] *Id.* at 272.

[231] *Id*.

WCX's argument makes no sense and is foreclosed by the Commission's rules. The service that WCX has requested of AT&T is plainly *data* roaming. WCX concedes that "when WCX's customers use WCX's interconnected voice and data or text-messaging service while roaming AT&T will not know that this is occurring" because (i) "to AT&T the communications will look like non-interconnected related communications," (ii) "AT&T will not perform many of the same functions it has historically undertaken with regular roaming voice calls or text-messages," and (i) "[t]o AT&T it will be no different than when WCX's customer is surfing the web or receiving an e-mail."[232] WCX further concedes that "[w]hen a WCX user uses *a WCX-supported interconnected voice, data or text-messaging service* while roaming, AT&T will not (and should not) be aware that this is occurring" because "[t]o AT&T it will look like regular non-interconnected broadband data."[233]

Such a service is data roaming governed by the data roaming rules, and indeed, the voice roaming rules by their terms are inapplicable. The voice roaming rules draw a sharp distinction between (i) "CMRS providers' provision of mobile voice and data services that are interconnected with the public switched network, as well as their provision of text messaging and push-to-talk services" and (ii) "mobile data service that is not interconnected with the public switched network."[234] "CMRS providers' provision of voice and data services that are interconnected with the public switched network" is subject to the Title II "automatic roaming" obligations set forth in 47 C.F.R. § 20.12(d), while the provision of "mobile data service that is not interconnected with the public switched network" is governed by Title III "commercial reasonableness" obligations set forth in 47 C.F.R. § 20.12(e). In providing the roaming services

[232] *Id*. at 271-72.

[233] Am. Compl. ¶ 5 (emphasis added).

[234] *Data Roaming Order* ¶ 41.

contemplated by the proposed agreement, AT&T would not be operating as a "CMRS carrier," it would not be offering anyone a "data service that is interconnected with the public switched network," and it would not be "utiliz[ing] an in-network switching facility that enables [AT&T] to re-use frequencies and accomplish seamless hand-offs of subscriber calls." [235] Accordingly, regardless of what services *WCX* may be offering to its own customers, AT&T would be providing only non-interconnected data roaming to WCX, and thus the voice roaming rules do not apply.

Indeed, Title II common carrier regulation *cannot* apply to these data services. Data roaming is not a common carrier activity. As explained above, the D.C. Circuit has confirmed that "mobile-data providers are statutorily immune, perhaps twice over, from treatment as common carriers."[236] Thus, the D.C. Circuit has found it "obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers."[237] As WCX itself acknowledges, "'Broadband Data' services are at this time not considered to be 'interconnected' or subject to Title II,"[238] and therefore, "the roaming terms, conditions and prices are presently subject to a lesser 'commercially reasonable' standard."[239]

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[235] Title II "automatic roaming" obligations apply only to "CMRS carriers if such carriers offer real-time, two-way switched voice or data *service that is interconnected with the public switched network* and utilizes an in-network switching facility that enables the carrier to re-use frequencies and accomplish seamless hand-offs of subscriber calls." 47 C.F.R. § 20.12(a)(2) (emphasis added).

[236] *Cellco*, 700 F.3d at 538.

[237] *Verizon*, 740 F.3d at 650; *see Cellco*, 700 F.3d at 545 ("[t]he Commission concedes that . . . it has no authority to treat mobile-data providers like Verizon as common carriers").

[238] Am. Compl. ¶ 4.

[239] *Id.*; *see also id.* ¶ 15 ("Broadband data is not interconnected, is not CMRS and is not Title II."). But even if the Commission were to find that the Title II standard applies to this case, the AT&T proposal would meet that standard because the proposal reflects market-tested terms and conditions forged in dozens of arm's-length, commercial negotiations. *See, e.g.*, *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order*, 9 FCC Rcd. 1411, 1478 (1994) (detariffing wireless services because "market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power"); Voice Roaming Order ¶ 35 ("taking into consideration . . . our preference for allowing competitive market forces to govern rate and rate structures for wireless services, we expressly decline to impose any corresponding rate regulation of automatic roaming

B. THE REMAINING STATUTES IDENTIFIED BY WCX DO NOT SUPPORT A CLAIM FOR RELIEF AGAINST AT&T

WCX also offers, with essentially no explanation, a grab-bag of additional statutory provisions that it contends support a claim against AT&T.[240] None of the provisions of the Communications Act identified by WCX supports a claim against AT&T.

1. WCX States No Claim Under 47 U.S.C. § 301

WCX provides no support for its claim that it can bring suit against AT&T for a violation of Section 301 of the Act. Section 301 is a general statement of purpose that authorizes the Commission to regulate "radio communication[s]" and "transmission of energy or communications or signals by radio."[241] Apart from a requirement to obtain a license from the Commission, Section 301 imposes no obligations on providers of wireless broadband services with regard to their interactions with other private parties and does not support an independent private right of action by WCX against AT&T. WCX provides no argument that Section 301(1) imposes obligations on AT&T, let alone obligations that are independent of those adopted by the Commission in Rule 20.12(e), or (2) creates a private right of action for WCX to file suit against AT&T. AT&T has satisfied its obligations under Rule 20.12(e) by offering WCX a data roaming agreement under commercially reasonable terms and conditions, and Section 301 imposes no additional obligations on AT&T.

2. WCX States No Claim Under 47 U.S.C. §§ 157(a) and 1302

Neither Section 157(a) nor Section 1302 provides a private right of action for WCX to bring claims against AT&T. Section 157(a) reflects a general policy of the United States "to

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services"); see also MCI WorldCom Inc. v. FCC, 209 F.2d 790 (D.C. Cir. 2000) (upholding Commission finding that when carriers do not have market power, appropriate to allow rates to be set by the "free market, the benefits of which are rather well established").

[240] Am. Compl. ¶ 41.

[241] 47 U.S.C. § 301.

encourage the provision of new technologies and services to the public," and Section 1302(a) exhorts the Commission to "encourage the deployment . . . of advanced telecommunications capability to all Americans." Neither of these provisions imposes any substantive obligations on AT&T or authorizes WCX to file a suit before the Commission based on a "violation" of their terms.[242] As such, neither provision supports a claim against AT&T.

3. WCX States No Claim Under 47 U.S.C. § 254

WCX asserts that AT&T violated 47 U.S.C. § 254, although it does not offer any explanation of this claim other than simply including that statutory section in a list of sections AT&T allegedly violated.[243] That claim is meritless. Section 254 sets forth a variety of obligations that relate to the Commission's universal service funding programs, but WCX has not identified any possible theory under which AT&T's proposed contractual terms here would be in violation of its contribution or other obligations under Section 254.

CONCLUSION

For these reasons, AT&T has not violated Commission Rule 20.12(e) or any of the other statutory provisions identified by WCX.

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[242] Nor can WCX rely upon general statements of congressional goals in these provisions to impose common carrier obligations on AT&T because that would contradict the specific limitations in the Communications Act. *Verizon*, 740 F.3d at 649-50 (holding that Commission cannot exercise authority under § 1302 "in a manner that contravenes any specific prohibition contained in the Communications Act"); *Comcast Corp. v. FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010) ("policy statements alone cannot provide the basis for the Commission's exercise of ancillary authority").

[243] Am. Compl. ¶ 41.

* * *

Dated: November 5, 2014

Respectfully submitted,

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TAB 7

REVISED
PUBLIC VERSION

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 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	)	

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C. THE PROVISIONS THAT ALLOW AT&T TO ENFORCE ITS RIGHTS AND PROTECT ITS NETWORK FACILITIES UNDER THE CONTRACT ARE COMMERCIALLY REASONABLE 39

III. WCX'S REMAINING CLAIMS SHOULD BE 40

AT&T Mobility LLC ("AT&T") submits these Proposed Findings of Fact and Conclusions of Law pursuant to Section 1.724(c) of the Federal Communications Commission (the "Commission") Rules, 47 C.F.R. § 1.724(c), as part of AT&T's response to the amended complaint filed by Worldcall Interconnect, Inc. ("WCX") (together with AT&T, the "Parties"), on October 1, 2014 (the "Amended Complaint"), in the above-captioned proceeding.

PROPOSED FINDINGS OF FACT

I. AT&T'S DATA ROAMING AGREEMENTS WITH OTHER WIRELESS PROVIDERS

FOF 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.[1]

FOF 2. AT&T has developed a draft agreement pursuant to which it offers data roaming services on its own network.[2]

FOF 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.[3]

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

FOF 5. AT&T's current data roaming agreements with other wireless providers include rates for LTE-based data roaming, all specifying an LTE roaming rate of [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[5]

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[1] Meadors Decl. ¶ 7.

[2] Meadors Decl. ¶ 11.

[3] Meadors Decl. ¶ 11.

[4] Meadors Decl. ¶ 11.

FOF 6. [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL][6]

FOF 7. 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]

FOF 8. AT&T's domestic roaming partners have paid data-roaming rates similar to those offered to WCX and have managed to maintain successful businesses.[8]

FOF 9. Overall, AT&T is a net purchaser of data roaming as it relies more on roaming on other networks, typically in rural regions.[9]

II. WCX AND ITS SERVICE AREA

FOF 10. WCX is a subsidiary of Worldcall, Inc., a telecommunications services and investment holding company formed in April 2004.[10]

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[5] Orszag Decl. ¶ 50.

[6] Orszag Decl. ¶ 51.

[7] Orszag Decl. ¶ 52.

[8] Orszag Decl. ¶ 89.

[9] Meadors Decl. ¶ 9.

[10] Meadors Decl. ¶ 12.

FOF 11. Mr. 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.[11]

FOF 12. Mr. Feldman previously was the CEO of UTEX Communications Corp. (d/b/a FeatureGroup IP) ("UTEX"), which owed AT&T entities millions of dollars when it filed for chapter 11 bankruptcy protection in March 2010.[12]

FOF 13. UTEX's chapter 11 bankruptcy case was converted to a chapter 7 liquidation, and the company ceased operations in December 2013.[13]

III. AT&T'S INITIAL DEALINGS WITH WCX IN 2011-12

FOF 14. On June 1, 2011, WCX approached AT&T regarding a potential LTE data roaming agreement.[14]

FOF 15. During late June and early July 2011, the Parties engaged in technical discussions and later executed a nondisclosure agreement.[15]

FOF 16. On July 20, 2011, AT&T provided to WCX a draft data roaming agreement that was a two-way data roaming agreement pursuant to which each Party would have the right—but not the obligation—to roam on the other Party's network.[16]

FOF 17. AT&T indicated on July 20, 2011, that it believed the Parties could negotiate in good faith and reach agreement on commercially-reasonable terms.[17]

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[11] Meadors Decl. ¶ 12.

[12] Meadors Decl. ¶ 12.

[13] Meadors Decl. ¶ 12.

[14] Meadors Decl. ¶ 15.

[15] Meadors Decl. ¶ 16.

[16] Meadors Decl. ¶ 16.

[17] Meadors Decl. ¶ 16.

FOF 18. WCX did not provide an alternative data roaming agreement to AT&T's July 20, 2011 draft or propose specific modifications to the AT&T draft, instead rejecting AT&T's proposal and taking the positions it continues to advance in the current proceeding.[18]

FOF 19. The major sticking point in the Parties negotiations in 2011 was the Parties' extremely 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 dozens of data roaming agreements with other wireless providers.[19]

FOF 20. Having reached an impasse, on October 11, 2011, the Parties sought the assistance of the Commission in attempting to negotiate a data roaming agreement.[20]

FOF 21. In seeking the Commission's assistance in October 2011, WCX stipulated that AT&T had been negotiating in good faith but that the Parties nevertheless had been unable to reach an agreement.[21]

FOF 22. 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 still did not reach an agreement.[22]

FOF 23. On May 2, 2012, WCX submitted a request to the Commission for permission to file a complaint against AT&T on the Commission's accelerated docket, which request the Commission denied, noting that WCX could file a complaint pursuant to the Commission's rules, but WCX did not file a complaint with the Commission at that time.[23]

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[18] Meadors Decl. ¶ 16.

[19] Meadors Decl. ¶ 17.

[20] Meadors Decl. ¶ 18.

[21] Meadors Decl. ¶ 18.

[22] Meadors Decl. ¶ 18.

[23] Meadors Decl. ¶¶ 19, 21.

FOF 24. AT&T negotiated in good faith with WCX in 2011-12 over a potential data roaming agreement.[24]

IV. AT&T'S RENEWED NEGOTIATIONS WITH WCX IN 2014

FOF 25. WCX did not contact AT&T again about a potential data roaming agreement until June 24, 2014, when Mr. Feldman forwarded the RWA Model Agreement and proposed that it be used as the basis of an agreement between AT&T and WCX.[25]

FOF 26. The RWA Model Agreement provided to AT&T on June 24, 2014, states that WCX would "endeavor to provide the majority of its customers' mobile data services on its own Network."[26]

FOF 27. Mr. Feldman noted, twice in his June 24, 2014 email, that he stood ready to call on the Commission to resolve the Parties' impasse.[27]

FOF 28. On July 2, 2014, AT&T responded to Mr. Feldman'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.[28]

FOF 29. AT&T explained in its July 2, 2014 email to WCX that AT&T's proposed roaming rates were based on arm's-length, negotiated rates that AT&T was paying to its domestic roaming partners and thus such rates were plainly commercially reasonable.[29]

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[24] Meadors Decl. ¶¶ 15-21.

[25] Meadors Decl. ¶ 22.

[26] Meadors Decl. ¶ 22.

[27] Meadors Decl. ¶ 22.

[28] Meadors Decl. ¶ 23.

[29] Meadors Decl. ¶ 23.

FOF 30. AT&T also took the position in its July 2, 2014 email to WCX that roaming should be limited to an incidental portion of a customer's use, but AT&T emphasized that it welcomed negotiations with WCX to reach a commercially-reasonable agreement.[30]

FOF 31. On July 29, 2014, AT&T provided its proposed data roaming agreement to Mr. Feldman.[31]

FOF 32. The data roaming rates [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] and usage restrictions [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] set forth in the AT&T proposal were the same figures that AT&T proposed during the Parties' 2011-12 negotiations.[32]

FOF 33. AT&T explained to Mr. Feldman 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 Mr. Feldman to provide feedback on the proposed agreement.[33]

FOF 34. In response to receiving the AT&T proposal, Mr. Feldman did not provide comments on the AT&T proposal and instead insisted that the RWA Model Agreement serve as the basis of the Parties' negotiations.[34]

FOF 35. On August 5, 2014, Mr. Feldman served WCX's Notice of Intent to File Formal Complaint and Offer to Discuss Possibility of Settlement (the "Formal Complaint Notice").[35]

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[30] Meadors Decl. ¶ 23.

[31] Meadors Decl. ¶ 27.

[32] Meadors Decl. ¶ 27.

[33] Meadors Decl. ¶ 27.

[34] Meadors Decl. ¶ 28.

[35] Meadors Decl. ¶ 31.

FOF 36. Pursuant to the Formal Complaint Notice, WCX accused AT&T of failing to negotiate in good faith and warned that, absent a negotiated solution, WCX intended to follow through with its threat to file a formal complaint with the Commission.[36]

FOF 37. WCX contended in the Formal Complaint Notice that the AT&T proposal could not even be used as a starting point for negotiations, particularly with respect to usage restrictions and roaming rates.[37]

FOF 38. In the Formal Complaint Notice, WCX warned AT&T that unless it was willing to negotiate based on the RWA Model Agreement and compromise significantly on all substantive issues, WCX would file a formal complaint with the Commission.[38]

FOF 39. On August 11, 2014, WCX again stated that unless AT&T ceased reaffirming its own positions or arguing with WCX's positions, WCX would file a formal complaint.[39]

FOF 40. AT&T responded to WCX's August 11, 2014 communication that AT&T "remain[ed] committed to negotiating in good faith," and that "[w]ith good faith on both sides, most of [the Parties'] differences c[ould] be resolved," and that AT&T "remain[ed] willing to negotiate a commercially reasonable data roaming agreement with WCX."[40]

FOF 41. The Parties held a teleconference to discuss their disputes, but it became apparent that an agreement would not be reached on the two principal sticking points (*i.e.*, usage restrictions and roaming rates).[41]

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[36] Meadors Decl. ¶ 31.

[37] Meadors Decl. ¶ 31.

[38] Meadors Decl. ¶ 31.

[39] Meadors Decl. ¶ 32.

[40] Meadors Decl. ¶ 32.

[41] Meadors Decl. ¶ 34.

FOF 42. On August 20, 2014, Mr. Feldman emailed AT&T 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.[42]

FOF 43. 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.[43]

FOF 44. On September 8, 2014, WCX filed its initial Complaint.[44]

FOF 45. AT&T negotiated in good faith with WCX in 2014 over a potential data roaming agreement.[45]

V. WCX'S ALTERNATIVES TO ROAMING WITH AT&T

FOF 46. WCX holds a 700 MHz Lower Band (B Block) license to provide wireless services in Cellular Market Area ("CMA") 667, which covers an area of central Texas that is bounded by the major population centers of Houston, San Antonio, and Austin.[46]

FOF 47. The residents of CMA 667 may choose to purchase wireless service from multiple providers.[47]

FOF 48. Nationwide wireless providers such as AT&T, Verizon, and Sprint all offer wireless services to the majority of CMA 667.[48]

FOF 49. A number of smaller wireless providers such as Texas Broadband, Inc., and Ranch Wireless, Inc., also serve communities, farms, and ranches in CMA 667.[49]

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[42] Meadors Decl. ¶ 35.

[43] Meadors Decl. ¶ 36.

[44] Meadors Decl. ¶ 36.

[45] Meadors Decl. ¶¶ 22-36.

[46] Meadors Decl. ¶ 13.

[47] Meadors Decl. ¶ 13.

[48] Meadors Decl. ¶ 13.

FOF 50. The population centers surrounding CMA 667 (*i.e.*, Houston, San Antonio, and Austin) are covered by the networks of an array of wireless providers, with AT&T, Verizon, Sprint, and T-Mobile all offering LTE service in the three cities.[50]

FOF 51. Current data from the federal government indicates that 100% of the populations in Houston, San Antonio, and Austin are covered by high-speed wireless networks with download speeds exceeding 10 MB/second.[51]

FOF 52. AT&T is not WCX's only potential roaming partner.[52]

FOF 53. There are many LTE networks in the areas adjacent to CMA 667 (WCX's service area) and nationwide.[53]

FOF 54. As a technical matter, the selection of devices that a facilities-based wireless provider makes available to its customers determines the customers' ability to roam on other providers' networks.[54]

FOF 55. As a business matter, WCX may choose which devices to offer to its customers.[55]

FOF 56. Existing, commercially available wireless devices support multiple bands, which means that WCX can obtain roaming from any provider that supports any of the bands in the devices it chooses to sell to its customers.[56]

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[49] Meadors Decl. ¶ 13.

[50] Meadors Decl. ¶ 14.

[51] Meadors Decl. ¶ 14.

[52] Prise Decl. ¶ 3.

[53] Orszag Decl. ¶¶ 7, 42.

[54] Prise Decl. ¶¶ 7-8.

[55] Orszag Decl. ¶ 42.

[56] Prise Decl. ¶ 3.

FOF 57. The Google Nexus 7—a device that WCX purports to offer—is capable of roaming on Verizon (Bands 4 and 13), T-Mobile (Bands 2 and 4), C-Spire (Bands 2 and 4), and numerous local and regional wireless providers.[57]

FOF 58. It would be contrary to industry practice for a wireless provider to limit its customers to roaming only on those networks that use the same spectrum used in the wireless provider's home network.[58]

FOF 59. 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.[59]

FOF 60. WCX's spectrum is compatible with Band 12, which has many options for data roaming.[60]

FOF 61. Band 12 is currently supported by T-Mobile, U.S. Cellular, and other providers, with Sprint soon to follow.[61]

FOF 62. There are numerous smaller wireless providers throughout the country that use (or plan to use) Band 12 for LTE in their home networks.[62]

VI. AT&T'S PROPOSED DATA ROAMING AGREEMENT

FOF 63. 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.[63]

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[57] Prise Decl. ¶ 3.

[58] Prise Decl. ¶ 4.

[59] Prise Decl. ¶ 4.

[60] Prise Decl. ¶¶ 4, 16.

[61] Prise Decl. ¶¶ 4, 16.

[62] Prise Decl. ¶¶ 13-14.

A. USAGE RESTRICTIONS

FOF 64. AT&T's proposed usage restrictions are set forth in Section 11 of the agreement.[64]

FOF 65. Section 11 of the AT&T proposal is commercially reasonable.[65]

1. Prohibition of Resale

FOF 66. Section 11 of the AT&T proposal [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[66]

FOF 67. Section 11 of the AT&T proposal 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.[67]

FOF 68. 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.[68]

2. Machine-to-Machine Services

FOF 69. The AT&T proposal does not erect barriers to entry for WCX to provide Machine-to-Machine ("M2M") services.[69]

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[63] Meadors Decl. ¶ 37.

[64] Meadors Decl. ¶ 38.

[65] Meadors Decl. ¶¶ 39-46.

[66] Meadors Decl. ¶ 39.

[67] Meadors Decl. ¶ 39.

[68] Second Report and Order, *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Mobile Data* Services, 26 F.C.C. Rcd. 5411 (2011) (the "*Data Roaming Order*"); Meadors Decl. ¶ 39.

[69] Meadors Decl. ¶ 41.

FOF 70. AT&T does not object to WCX selling M2M services to its customers, but maintains that, consistent with the *Data Roaming Order*, WCX should do so by selling services to customers that reside in its own network coverage area or through a resale agreement with a facilities-based provider for customers that reside outside its network coverage area.[70]

FOF 71. 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" language in the *Data Roaming Order*.[71]

FOF 72. The provisions of AT&T's offer that limit the wireless services provided under a data roaming agreement with WCX to roaming, while excluding resale, are commercially reasonable.[72]

3. Limit on Total Traffic Volume

FOF 73. Section 11(a) of the AT&T proposal provides that [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[73]

FOF 74. Section 11(a) of the AT&T proposal is commercially reasonable.[74]

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[70] Meadors Decl. ¶ 41.

[71] Meadors Decl. ¶ 41.

[72] Meadors Decl. ¶ 41.

[73] Meadors Decl. ¶ 42; Orszag Decl. ¶¶ 36, 60-61.

[74] Meadors Decl. ¶¶ 42-43.

FOF 75. 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.[75]

FOF 76. [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL][76]

FOF 77. Some of AT&T's domestic roaming partners have abused their roaming agreements with AT&T by reselling AT&T's data roaming services.[77]

FOF 78. [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL][78]

FOF 79. [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL][79]

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[75] Meadors Decl. ¶ 42.

[76] Meadors Decl. ¶ 42.

[77] Meadors Decl. ¶ 43.

[78] Meadors Decl. ¶ 43.

[79] Meadors Decl. ¶ 43.

FOF 80. AT&T has been willing to make reasonable adjustments in the [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL], but WCX's demands have actually increased from [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] to 50% (in 2014).[80]

FOF 81. Because the AT&T proposal does not limit WCX to one roaming partner, WCX could enter into data roaming agreements with additional wireless providers if WCX believes its customers require a higher percentage of their total traffic to be roaming.[81]

4. Limits on Individual Accounts

FOF 82. Section 11(b) of the AT&T proposal [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[82]

FOF 83. Section 11(b) of the AT&T proposal is commercially reasonable.[83]

FOF 84. Usage restrictions on individual accounts are in most of AT&T's data roaming agreements with other wireless providers.[84]

FOF 85. 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.[85]

FOF 86. 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*.[86]

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[80] Meadors Decl. ¶ 43.

[81] Orszag Decl. ¶ 62.

[82] Meadors Decl. ¶ 44; Orszag Decl. ¶¶ 36, 60-61.

[83] Meadors Decl. ¶¶ 44-46.

[84] Meadors Decl. ¶ 44.

[85] Meadors Decl. ¶ 44.

FOF 87. It is commercially reasonable for AT&T to seek to protect its investment in its network from backdoor resale.[87]

FOF 88. 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.[88]

FOF 89. 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.[89]

FOF 90. AT&T's proposed usage restrictions are fully consistent with industry practice.[90]

B. ROAMING RATES

FOF 91. The AT&T proposal, Exhibit 8, sets forth [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[91]

FOF 92. AT&T's proposed roaming rates are commercially reasonable.[92]

FOF 93. 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.[93]

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[86] Meadors Decl. ¶ 44.

[87] Meadors Decl. ¶ 45.

[88] Meadors Decl. ¶ 45.

[89] Meadors Decl. ¶ 45.

[90] Meadors Decl. ¶ 46.

[91] Meadors Decl. ¶¶ 47-48; Orszag Decl. ¶ 36.

[92] Meadors Decl. ¶¶ 47-51.

FOF 94. AT&T's proposed roaming rates are "significantly below the average rates [AT&T is currently] paying to its domestic roaming partners."[94]

FOF 95. 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.[95]

FOF 96. [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL][96]

FOF 97. [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL][97]

FOF 98. 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, thereby allowing the host network provider to properly predict data usage and avoid unnecessary congestion.[98]

FOF 99. WCX could continue to expand the geographic reach of its wireless network through means other than roaming.[99]

FOF 100. WCX's wireless network covers approximately 35% of CMA 667.[100]

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[93] Meadors Decl. ¶ 47.

[94] Meadors Decl. ¶ 47.

[95] Meadors Decl. ¶ 49.

[96] Meadors Decl. ¶ 49.

[97] Meadors Decl. ¶ 49.

[98] Meadors Decl. ¶ 49.

[99] Meadors Decl. ¶ 51.

[100] Meadors Decl. ¶ 51.

FOF 101. 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.[101]

C. OTHER PROVISIONS

1. Audit Rights (Section 11(c))

FOF 102. Section 11(c) of the AT&T proposal provides that [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[102]

FOF 103. Under Section 11(c) of the AT&T proposal, [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[103]

FOF 104. Section 11(c) of the AT&T proposal is commercially reasonable.[104]

FOF 105. Audit provisions are often found in commercial agreements.[105]

FOF 106. Section 11(c) is a mechanism to confirm that contractual provisions are being followed.[106]

FOF 107. 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

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[101] Orszag Decl. ¶ 89.

[102] Meadors Decl. ¶ 53.

[103] Meadors Decl. ¶ 53; Orszag Decl. ¶ 36.

[104] Meadors Decl. ¶¶ 53-55.

[105] Meadors Decl. ¶ 54.

[106] Orszag Decl. ¶ 66.

having to litigate payment disputes with Mr. Feldman's other companies, one of which (UTEX) went bankrupt while owing AT&T millions of dollars.[107]

FOF 108. Section 11(c) of the AT&T proposal reduces the chance that the Parties will have to litigate payment disputes.[108]

FOF 109. Section 11(c) of the AT&T proposal provides that [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."[109]

FOF 110. 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.[110]

FOF 111. WCX never raised concerns about Section 11(c) of the AT&T proposal during the Parties' discussions.[111]

FOF 112. AT&T remains willing to negotiate with WCX about Section 11(c) of the AT&T proposal.[112]

2. Suspension and Termination (Sections 17 and 20)

FOF 113. AT&T's proposed suspension and termination provisions in Sections 17 and 20, respectively, are commercially reasonable.[113]

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[107] Meadors Decl. ¶ 54.

[108] Meadors Decl. ¶ 54.

[109] Meadors Decl. ¶ 54.

[110] Meadors Decl. ¶ 55.

[111] Meadors Decl. ¶ 55.

[112] Meadors Decl. ¶ 55.

FOF 114. Under Sections 17(a) and (c) of the AT&T proposal, [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[114]

FOF 115. Section 17(b) of the AT&T proposal [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[115]

FOF 116. Section 20 of the AT&T proposal provides that [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[116]

FOF 117. 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.[117]

FOF 118. Similar suspension and termination provisions appear in all of AT&T's dozens of data roaming agreements with other wireless providers.[118]

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[113] Meadors Decl. ¶¶ 56-62.

[114] Meadors Decl. ¶ 57.

[115] Meadors Decl. ¶ 57.

[116] Meadors Decl. ¶ 58.

[117] Meadors Decl. ¶ 59.

FOF 119. 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.[119]

FOF 120. The Commission has noted that suspension of service provisions are already a feature of many commercially-negotiated agreements.[120]

FOF 121. There is no evidence supporting the assertion 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.[121]

FOF 122. Under the suspension provision in the AT&T proposal, [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[122]

FOF 123. 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.[123]

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[118] Meadors Decl. ¶ 59.

[119] Meadors Decl. ¶ 59.

[120] Orszag Decl. ¶ 63.

[121] Meadors Decl. ¶¶ 60-61.

[122] Meadors Decl. ¶ 61.

[123] Meadors Decl. ¶ 62.

FOF 124. 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.[124]

FOF 125. 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.[125]

3. Binding Arbitration (Section 23(b))

FOF 126. Section 23(b) of the AT&T proposal provides [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[126]

FOF 127. Section 23(b) of the AT&T proposal states that [BEGIN CONFIDENTIAL] [redacted]

[124] Meadors Decl. ¶ 62.

[125] Meadors Decl. ¶ 62.

[126] Meadors Decl. ¶ 63.

[END CONFIDENTIAL].[127]

FOF 128. Section 23(b) of the AT&T proposal is commercially reasonable.[128]

FOF 129. Arbitration provisions are common in commercial contracts.[129]

FOF 130. The Commission noted in the *Data Roaming Order* that parties were free to enter into mandatory arbitration agreements in connection with data roaming agreements.[130]

FOF 131. AT&T has negotiated to include arbitration provisions in all of its data roaming agreements with other wireless providers.[131]

FOF 132. The RWA Model Agreement that WCX sent to AT&T on June 24, 2014, provided for mandatory arbitration under the American Arbitration Association rules, but WCX later revised that provision to permit, but not require, arbitration.[132]

4. Limits of Liability (Section 24)

FOF 133. Section 24 of the AT&T proposal [BEGIN CONFIDENTIAL] [END CONFIDENTIAL].[133]

FOF 134. Section 24 of the AT&T proposal is commercially reasonable.[134]

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[127] Meadors Decl. ¶ 63.

[128] Meadors Decl. ¶¶ 63-65.

[129] Meadors Decl. ¶ 64.

[130] Meadors Decl. ¶ 64.

[131] Meadors Decl. ¶ 64.

[132] Meadors Decl. ¶ 64.

[133] Meadors Decl. ¶ 66.

[134] Meadors Decl. ¶¶ 66-67.

FOF 135. Provisions limiting liability are standard in AT&T's dozens of commercially-negotiated data roaming agreements with other wireless providers.[135]

FOF 136. The RWA Model Agreement contains a provision limiting "proven damage or loss," excluding "consequential damage or loss," to $1 million.[136]

5. Network Monitoring (No Provision Cited)

FOF 137. The AT&T proposal [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL].[137]

FOF 138. These provisions in the AT&T proposal are commercially reasonable.[138]

FOF 139. 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.[139]

FOF 140. 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.[140]

FOF 141. The AT&T proposal simply seeks to confirm AT&T's rights to operate and control its network and serve the needs of its customers.[141]

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[135] Meadors Decl. ¶ 67.

[136] Meadors Decl. ¶ 67.

[137] Orszag Decl. ¶ 36.

[138] Meadors Decl. ¶¶ 68-69.

[139] Meadors Decl. ¶ 69.

[140] Meadors Decl. ¶ 69.

[141] Meadors Decl. ¶ 69.

FOF 142. Consistent with the *Data Roaming Order*, monitoring provisions in the AT&T proposal are a "commercially reasonable measure[ ] to safeguard the quality of service against network congestion that may result from roaming traffic or to prevent harm to the network."[142]

FOF 143. WCX identifies no criticisms of AT&T's customer privacy policy, which is referenced in the AT&T proposal.[143]

6. Vague and Ambiguous Terms (No Provision Cited)

FOF 144. WCX raises objections to only a handful of the [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] comprising the AT&T proposal.[144]

FOF 145. The Parties have long understood that there are two main issues in their negotiations over a potential data roaming agreement: usage restrictions and roaming rates.[145]

FOF 146. The Parties' discussions in 2011-12 and 2014 about a potential data roaming agreement focused on usage restrictions and roaming rates.[146]

FOF 147. 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.[147]

VII. WCX'S PROPOSED DATA ROAMING AGREEMENT

FOF 148. The RWA Model Agreement is the result of discussions between like-minded rural wireless providers—including WCX—belonging to the RWA's Roaming Committee.[148]

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[142] Meadors Decl. ¶ 69.

[143] Meadors Decl. ¶ 69.

[144] Meadors Decl. ¶ 71.

[145] Meadors Decl. ¶ 71.

[146] Meadors Decl. ¶ 71.

[147] Meadors Decl. ¶ 71.

FOF 149. Mr. Feldman chaired the RWA's Roaming Committee during its discussions about a model data roaming agreement.[149]

FOF 150. The RWA Model Agreement is not commercially reasonable.[150]

A. USAGE RESTRICTIONS

FOF 151. The sole provision in the RWA Model Agreement purporting to impose usage restrictions is a statement that each Party will "*endeavor to provide* the majority of its customers' mobile data services on its own [n]etwork."[151]

FOF 152. The lack of specific usage restrictions in the RWA Model Agreement is not commercially reasonable.[152]

FOF 153. 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."[153]

FOF 154. The RWA Model Agreement would specifically prohibit AT&T from "limit[ing] or condition[ing] . . . roaming in any manner that prohibits or diminishes the ability of [WCX] to . . . act as a *wholesaler* of [roaming services] or provide access to [roaming services] to *[r]esellers*," which would enable WCX to market and sell services to customers outside of WCX's licensed service area, which is "resale" and not roaming[154]

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[148] Meadors Decl. ¶ 72.

[149] Meadors Decl. ¶ 72.

[150] Meadors Decl. ¶¶ 72-79.

[151] Meadors Decl. ¶ 73.

[152] Meadors Decl. ¶¶ 73-74.

[153] Meadors Decl. ¶ 74.

[154] Meadors Decl. ¶ 74.

B. ROAMING RATES

FOF 155. The RWA Model Agreement imposes a cap on data roaming rates purportedly based on the "prevailing retail rate" (allegedly $10/GB, or 0.96¢/MB), which WCX contends is the only commercially-reasonable benchmark for roaming rates.[155]

FOF 156. WCX's proposed data roaming rate is not commercially reasonable.[156]

FOF 157. 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.[157]

FOF 158. WCX's proposed data roaming rate is not the "prevailing retail rate."[158]

FOF 159. 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.[159]

FOF 160. 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.[160]

FOF 161. WCX's request that the Commission mandate the roaming rate in this case amounts to the "specific prescriptive regulation of rates."[161]

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[155] Meadors Decl. ¶ 75.

[156] Meadors Decl. ¶¶ 75-76; Orszag Decl. ¶¶ 76-85.

[157] Orszag Decl. ¶ 79.

[158] Meadors Decl. ¶ 75; Orszag Decl. ¶¶ 95-100.

[159] Meadors Decl. ¶ 75.

[160] Meadors Decl. ¶ 75.

[161] Meadors Decl. ¶ 76; Orszag Decl. ¶¶ 77, 83.

C. SUSPENSION OF SERVICE

FOF 162. Section 12 of the RWA Model Agreement allows only the "Home Carrier" to suspend service to all of its "Authorized Users."[162]

FOF 163. Section 12 of the RWA Model Agreement is not commercially reasonable.[163]

FOF 164. Under Section 12 of the RWA Model Agreement, AT&T's ability to suspend service to individual users *on its own network* 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.[164]

FOF 165. 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.[165]

D. TERM OF AGREEMEN/TERMINATION RIGHTS

FOF 166. The RWA Model Agreement provides that the agreement shall continue "in perpetuity" (Section 2) subject to very limited termination rights (Section 13), under which AT&T would be unable unilaterally to terminate the agreement unless (i) WCX 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.[166]

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[162] Meadors Decl. ¶ 77.

[163] Meadors Decl. ¶ 77.

[164] Meadors Decl. ¶ 77.

[165] Meadors Decl. ¶ 77.

[166] Meadors Decl. ¶ 78.

FOF 167. Sections 2 and 13 of the RWA Model Agreement are not commercially reasonable.[167]

FOF 168. 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.[168]

E. MISCELLANEOUS

FOF 169. The RWA Model Agreement was not designed specifically for the technical requirements of the AT&T network.[169]

FOF 170. 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.[170]

FOF 171. 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."[171]

FOF 172. AT&T has repeatedly expressed its willingness to negotiate with WCX in an attempt to resolve its concerns about the AT&T proposal.[172]

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[167] Meadors Decl. ¶ 78; Orszag Decl. ¶¶ 83, 112-13.

[168] Meadors Decl. ¶ 78.

[169] Meadors Decl. ¶ 79.

[170] Meadors Decl. ¶ 79.

[171] Meadors Decl. ¶ 79.

[172] Meadors Decl. ¶ 80.

PROPOSED CONCLUSIONS OF LAW

COL 1. WCX's Complaint fails to state a claim upon which relief can be granted.

I. WCX'S CLAIMS ARE BASED ON A FUNDAMENTAL MISUNDERSTANDING OF THE COMMISSION'S "I. COMMERCIAL REASONABLENESS" STANDARD

COL 2. The Commission's data roaming rules require facilities-based providers of mobile data services to offer data roaming to other providers on "commercially reasonable" terms and conditions.[173]

COL 3. 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.[174]

COL 4. The Commission declined to impose specific rate regulations, but rather sought to rely on arm's-length contract negotiations between providers to set the terms for data roaming.[175]

COL 5. The broadband data services at issue here are not common carrier services, and Section 332(c) expressly prohibits the Commission from treating a provider of such services "as a common carrier for any purpose under this Act."[176]

COL 6. The D.C. Circuit has found it "obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers."[177]

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[173] *Data Roaming Order* ¶¶ 1, 9, 42; 47 C.F.R. § 20.12(e).

[174] *Data Roaming Order* ¶¶ 13, 40, 48.

[175] *Data Roaming Order* ¶ 21.

[176] 47 U.S.C. §§ 332(c)(2) & (d); *Cellco P'ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012) ("mobile-data providers are statutorily immune, perhaps twice over, from treatment as common carriers" (emphasis in original)).

[177] *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014) (citing *Cellco*, 700 F.3d at 538); *see also Cellco*, 700 F.3d at 545 ("the Commission concedes that . . . it has no authority to treat mobile-data providers like Verizon as common carriers").

COL 7. The Commission deliberately chose *not* to apply the Title II just and reasonable standard to wholesale data roaming arrangements, and it insisted that "we here *reject* – rather than determine how to enforce – a common carriage requirement of 'just and reasonable' rates, terms, and conditions"[178]; as a result, the commercial reasonableness standard is—and as a statutory matter, *must* be—considerably more flexible than the "just and reasonable" standard of common carrier regulation.

COL 8. The D.C. Circuit rejected a facial challenge to the data roaming rules because it concluded that those rules could be interpreted to "differ materially from the kind of requirements that necessarily amount to common carriage."[179]

COL 9. The commercial reasonableness standard does not include a "prescriptive regulation of rates," but instead grants "host providers appropriate discretion in the structure and level of such rates that they offer."[180]

COL 10. The commercial reasonableness standard allows for a *broader* range of marketplace rates than the "just and reasonable" ratemaking standard, which itself contemplates a range, or "zone," of acceptable rates.[181]

COL 11. The commercial reasonableness standard provides greater latitude than the "just and reasonable" standard in negotiations, allowing "greater flexibility and variation in terms and conditions."[182]

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[178] *Data Roaming Order* ¶ 68 n.198 (emphasis added).

[179] *Cellco*, 700 F.3d at 547.

[180] *Data Roaming Order* ¶ 21.

[181] *FPC* v. *Conway Corp.*, 426 U.S. 271, 278 (1976) ("there is no single cost-recovering rate, but a zone of reasonableness: statutory reasonableness is an abstract quality represented by an area, rather than a pinpoint" (quotation omitted)); 47 U.S.C. § 201.

[182] *Data Roaming Order* ¶ 78.

COL 12. Unlike common carriage regulation, the Commission's data roaming rules leave "substantial room for individualized bargaining and discrimination in terms."[183]

COL 13. The Commission was aware that data roaming obligations could create "the possibility that requesting providers will substitute roaming for investment in coverage and accordingly under-invest in deploying new infrastructure."[184]

COL 14. The Commission admonished that the data roaming obligations "may not be used by requesting carriers as a backdoor way to create *de facto* mandatory resale obligations."[185]

COL 15. The Commission explained that roaming rates should ordinarily substantially exceed retail rates, because "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 carrier's network."[186]

COL 16. The Commission has rejected retail rates as a "benchmark" for evaluating the reasonableness of wholesale roaming rates.[187]

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[183] *Cellco*, 700 F.3d at 548.

[184] *Data Roaming Order* ¶ 34; *see also id.* ¶ 21 n.76 (recognizing also that "there are pro-competitive benefits that flow from providers differentiating themselves on the basis of coverage," and thus host providers may have a disincentive to invest in their networks if other providers can "free-ride" on their investment via roaming"); *see also id.* ¶¶ 16-22, 33-34.

[185] *Data Roaming Order* ¶ 88; *see also id.* ¶ 41 n.122 ("As we have stated in the past, however, roaming arrangements cannot be used as a backdoor way to create *de facto* mandatory resale obligations."); *id.* ¶ 34 ("we provide that the data roaming obligation does not create mandatory resale obligations").

[186] *Data Roaming Order* ¶ 21; *see also id.* ¶ 51 ("As discussed above, the relatively high price of roaming compared to providing facilities-based service will often be sufficient to counterbalance the incentive to scale back deployments in favor or relying on another provider's network.").

[187] *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817 ¶ 7 n.10, ¶¶ 36-40 n.102 (2007) ("*Voice Roaming Order*"); *see also* Order on Reconsideration and Second Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 25 FCC Rcd. 4181 ¶ 32 n.90 (2010) ("*Voice Roaming Order on Reconsideration*") (fact that "roaming rates [are] *much higher* than retail rates" would preserve investment incentives).

COL 17. The Commission has recognized that usage restrictions are commercially reasonable and explained that "the terms and conditions offered by mobile data service providers . . . commonly include authorizing termination of service or other action if a subscriber's roaming on other networks becomes too large a part of the subscriber's service use."[188]

COL 18. 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*.[189]

COL 19. The *best* marketplace evidence of reasonableness are the rates and terms that have already been negotiated at arm's length in the commercial marketplace.[190]

COL 20. The Commission has indicated that, in assessing the seventeen factors, it will apply a presumption that signed marketplace agreements that have never been challenged are commercially reasonable.[191]

COL 21. When rates and terms are directly observable in the marketplace, and broadband data providers are competing successfully in reliance on those rates and terms, then

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[188] *Data Roaming Order* ¶ 21 (explaining that usage restrictions would make it unlikely for providers "to rely on roaming arrangements in place of network deployment as a primary source of their service provision"). The Commission similarly made clear that "providers of commercial mobile data services are free to negotiate commercially reasonable measures to safeguard quality of service against network congestion that may result from roaming traffic or to prevent harm to their network." *Id.* ¶ 52.

[189] *Data Roaming Order* ¶¶ 74, 86.

[190] *Data Roaming Order* ¶¶ 82, 86.

[191] *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.").

any offer that is generally consistent with such rates and terms is "commercially reasonable" within the meaning of the Commission's rule.[192]

COL 22. The commercial reasonableness standard looks to the range of rates and terms that have already been negotiated at arm's length in the marketplace, which are presumed to be reasonable.[193]

COL 23. In adopting a commercial reasonableness standard, the Commission expressly rejected any "prescriptive rate regulation."[194]

II. WCX'S CLAIM UNDER RULE 20.12(E) FAILS BECAUSE AT&T HAS OFFERED WCX DATA ROAMING ON "COMMERCIALLY REASONABLE" TERMS

COL 24. WCX's Complaint fails to state a claim under 47 C.F.R. § 20.12(e).

COL 25. The Commission's data roaming rules require AT&T to offer WCX a roaming agreement with commercially reasonable rates and terms.[195]

COL 26. 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."[196]

COL 27. AT&T complies with the *Data Roaming Order* as long as AT&T made a commercially reasonable offer.[197]

COL 28. AT&T satisfied this standard here because (i) the rates AT&T has proposed are well within, and indeed are at the low end, of the range of rates that prevail in existing

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[192] *See, e.g.*, *Matthews v. Wis. Energy Corp.*, 642 F.3d 565, 572 (7th Cir. 2011) ("A willingness to pay is an indication of commercial reasonableness.").

[193] *Data Roaming Order* ¶¶ 82, 86.

[194] *Data Roaming Order* ¶ 21.

[195] 47 C.F.R. § 20.12(e)(1).

[196] 47 C.F.R. § 20.12(e)(1).

[197] 47 C.F.R. § 20.12(e)(1).

marketplace agreements, (ii) AT&T's proposed limits on usage that are designed to prevent the roaming arrangement from becoming a *de facto* resale arrangement, and (iii) AT&T's additional terms to enforce those limitations are commonplace throughout the industry and plainly reasonable.

COL 29. AT&T's proposed usage restrictions are fully aligned with the Commission's expressed goals in the *Data Roaming Order* of making data roaming services available while maintaining "incentives" for wireless providers to "invest and innovate by using available spectrum and constructing wireless network facilities on a widespread basis."[198]

COL 30. The Commission has explained that "the standard of commercial reasonableness" is expected "to accommodate a variety of terms and conditions in data roaming,"[199] and "allows *host providers to control the terms and conditions of the proffered data roaming arrangements*, within the general requirement of commercial reasonableness."[200]

COL 31. Because the AT&T proposal was and is "commercially reasonable," WCX's claims here fail; the data roaming rules do not require AT&T to accept WCX's proposed terms, conditions, and prices even if they were commercially reasonable.

COL 32. AT&T's proposed terms and conditions are commercially reasonable.

COL 33. AT&T's proposed usage restrictions—including [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]—are commercially reasonable.

COL 34. AT&T's proposed roaming rates—including [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]—are commercially reasonable.

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[198] Meadors Decl. ¶ 46.

[199] *Data Roaming Order* ¶ 81.

[200] *Data Roaming Order* ¶ 33 (emphasis added).

COL 35. AT&T's proposed audit rights provisions are commercially reasonable.

COL 36. AT&T's proposed suspension and termination provisions are commercially reasonable.

COL 37. AT&T's proposed arbitration provisions are commercially reasonable.

COL 38. AT&T's proposed limits of liability provisions are commercially reasonable.

COL 39. AT&T's proposed network monitoring provisions are commercially reasonable.

COL 40. WCX's proposed terms and conditions are inconsistent with the *Data Roaming Order*, and would rewrite those rules in ways that undermine the Commission's policies to promote broadband investment.

A. AT&T'S PROPOSED DATA ROAMING RATES ARE COMMERCIALLY REASONABLE

COL 41. AT&T's proposed roaming rates are commercially reasonable because they are consistent with the prevailing marketplace rates for wholesale data roaming.

COL 42. The Commission's data roaming rules do not require AT&T to offer rates that are below the entire range of observable marketplace rates.

COL 43. The Commission has expressly rejected retail rates as a benchmark.

COL 44. The Commission made clear that it expects roaming rates to be "much higher than retail rates,"[201] which is necessary to "counterbalance the incentive" to "rely[] on another provider's network."[202]

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[201] *Voice Roaming Order on Reconsideration* ¶ 32 n.90.

[202] *Data Roaming Order* ¶ 51; *see also id.* ¶ 21 ("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 carrier's network"); *Voice Roaming Order* ¶¶ 36-40 (specifically rejecting cap "based on some benchmark of retail rates").

COL 45. The Commission intended for commercially reasonable roaming to rates to preclude the viability of any business model that would use roaming as "backdoor resale," because such arrangements would discourage broadband investment.[203]

COL 46. "[T]he relatively high price of [*data*] roaming compared to providing facilities-based service" is necessary to "counterbalance the incentive to 'piggy back' on another carrier's network."[204]

COL 47. A retail rate price cap or benchmark "would deter investment in network deployment by impairing buildout incentives facing both small and large carriers," and "tend to diminish smaller carriers' incentives to expand the geographic coverage of their networks."[205]

COL 48. Tying roaming rates to retail rates could diminish the incentive to providers to "lower retail rates . . . and perhaps even give [providers] an incentive to raise retail rates."[206]

COL 49. The Commission reaffirmed its rejection of "retail rates" in the *Voice Roaming Reconsideration Order*, and again in the *Data Roaming Order*.[207]

COL 50. WCX offers no evidence that its proposed rate has ever been accepted in the commercial marketplace in an agreement reached through arm's length negotiations.

COL 51. WCX's retail rate benchmark would eliminate most of the negotiating freedom that providers rely on today because WCX is proposing a single rate benchmark that is radically lower than the rate that scores of sophisticated parties have actually negotiated in the marketplace and that, under the current rules, presumptively are commercially reasonable.[208]

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[203] *Data Roaming Order* ¶¶ 34, 41 n.122.

[204] *Data Roaming Order* ¶ 21.

[205] *I Data Roaming Order* ¶ 40.

[206] *Data Roaming Order* ¶ 39.

[207] *Data Roaming Order* ¶ 21 (citing *Voice Roaming Reconsideration Order*).

[208] *Data Roaming Order* ¶ 81.

COL 52. The relief requested by WCX regarding rates would transform the private carriage "commercial reasonableness" standard into a common carrier regime of rate regulation based on WCX's proposal for what it believes to be a "reasonable" rate, making any purported difference between the "commercially reasonable" and common carrier "just and reasonable" standards mere "smoke and mirrors."[209]

COL 53. WCX is essentially seeking the "specific prescriptive regulation of rates," which the *Data Roaming Order* explicitly rejected.[210]

COL 54. WCX's proposed roaming rate is not consistent with the Commission's objective, set forth in the *Data Roaming Order*, of "giv[ing] host providers appropriate discretion in the structure and level of [the] rates that they offer."[211]

COL 55. WCX's proposed roaming rate conflicts with the Commission's policy statement in the *Data Roaming Order* that data roaming rates should be at levels that maintain incentives for wireless providers to invest in their own networks.[212]

COL 56. The "relatively high price of roaming" is the "pro-investment incentive" the Commission stated in the *Data Roaming Order* would "counterbalance the incentive to 'piggy back' on another carrier's network."[213]

B. AT&T'S RESTRICTIONS ON RESALE AND ROAMING ARE COMMERCIALLY REASONABLE

COL 57. A contract provision prohibiting resale is commercially reasonable under the data roaming rules.[214]

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[209] *Cellco*, 700 F.3d at 548.

[210] Meadors Decl. ¶ 50.

[211] Meadors Decl. ¶ 50.

[212] Meadors Decl. ¶ 51.

[213] Meadors Decl. ¶ 51.

COL 58. AT&T's concerns that led to the inclusion of a provision addressing "backdoor resale,"[215] are especially reasonable here, where WCX "has made clear that 'significant roaming . . . is essential' to its business plans."[216]

COL 59. AT&T's proposed usage restrictions are commercially reasonable, because they implement the Commission's express holding that "roaming arrangements should not be used as *de facto* resale,"[217] and its policy determination that such resale "would reduce incentives of facilities-based providers to build out and upgrade their facilities."[218]

COL 60. The *Data Roaming Order* authorizes AT&T to propose terms that prevent WCX from using AT&T's network to market and sell services to subscribers residing outside WCX's service territory.[219]

COL 61. WCX's position that "[t]here should be no limitations to any individual account" is not commercially reasonable. WCX's proposal would allow WCX to subscribe to AT&T's broadband facilities and then reoffer AT&T's service to WCX subscribers anywhere in the country, even if they have no connection to WCX's service area, all based on WCX's data roaming arrangement with AT&T. That arrangement is *de facto* "resale," which is contrary to the *Data Roaming Order*.[220]

COL 62. WCX's proposal to "*endeavor* to provide the majority of its customers' mobile Data Services on its own Network" is not commercially reasonable. Such a term on its

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[214] *Data Roaming Order* ¶ 88; *see also id.* ¶ 41 n.122 ("As we have stated in the past, however, roaming arrangements cannot be used as a backdoor way to create *de facto* mandatory resale obligations."); *id.* ¶ 34 ("we provide that the data roaming obligation does not create mandatory resale obligations").

[215] *Data Roaming Order* ¶¶ 34, 41 n.122.

[216] Meadors Decl. ¶ 39 (citing Am. Compl. ¶ 50).

[217] *Data Roaming Order* ¶ 41 n.122.

[218] *Data Roaming Order* ¶ 34.

[219] Meadors Decl. ¶ 74.

[220] *Data Roaming Order* ¶¶ 34, 41 n.122.

face would facilitate *de facto* resale in violation of the Commission's admonition that the data roaming obligations "may not be used by requesting carriers as a backdoor way to create *de facto* mandatory resale obligations."[221]

C. THE PROVISIONS THAT ALLOW AT&T TO ENFORCE ITS RIGHTS AND PROTECT ITS NETWORK FACILITIES UNDER THE CONTRACT ARE COMMERCIALLY REASONABLE

COL 63. Contract provisions designed to monitor and enforce contractual rights are standard in commercial agreements generally, in data roaming agreements specifically, and are commercially reasonable.

COL 64. AT&T's proposed audit provision is commercially reasonable because "providers of commercial mobile data services are free to negotiate commercially reasonable measures to safeguard quality of service against network congestion that may result from roaming traffic or to prevent harm to their network."[222]

COL 65. AT&T's proposed suspension and termination provisions are commercially reasonable because they are necessary to protect AT&T's network from congestion or harm and to enforce AT&T's contractual rights under the agreement.[223]

COL 66. The Commission has noted with approval that "providers already commonly include in their negotiated roaming agreements terms that give a host provider the ability to suspend roaming service if roaming becomes impractical for reasons such as overload, outage, or other operational or technical issues."[224]

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[221] *Data Roaming Order* ¶ 88; *see also id.* ¶ 41 n.122 ("As we have stated in the past, however, roaming arrangements cannot be used as a backdoor way to create *de facto* mandatory resale obligations."); *id.* ¶ 34 ("we provide that the data roaming obligation does not create mandatory resale obligations").

[222] *Data Roaming Order* ¶ 52.

[223] *Data Roaming Order*

[224] *Data Roaming Order* ¶ 85 n.242.

COL 67. AT&T's proposed dispute resolution provision is commercially reasonable because the Commission has explained that providers in the marketplace are "free to negotiate and mutually agree to other processes, such as third party mediation or arbitration, as a means to resolve roaming disputes."[225]

COL 68. AT&T's ability to suspend service under Section 17(a) of the AT&T proposal is commercially reasonable to allow AT&T to protect its network from congestion or harm and is consistent with similar suspension terms in agreements involving other providers as expressly recognized by the Commission.[226]

III. WCX'S REMAINING CLAIMS SHOULD BE REJECTED

COL 69. Common carrier obligations do not apply to AT&T's provision of data roaming services, and the remaining statutes identified by WCX do not state a claim against AT&T.

COL 70. The service that WCX has requested from AT&T is data roaming.

COL 71. The voice roaming rules do not apply to the Parties' dispute.[227]

COL 72. "CMRS providers' provision of voice and data services that are interconnected with the public switched network" is subject to the Title II "automatic roaming" obligations set forth in 47 C.F.R. § 20.12(d), while the provision of "mobile data service that is not interconnected with the public switched network" is governed by Title III "commercial reasonableness" obligations set forth in 47 C.F.R. § 20.12(e).

COL 73. In providing the data roaming services contemplated by the proposed agreement, AT&T would not be operating as a "CMRS carrier," it would not be offering anyone

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[225] *Data Roaming Order* ¶ 83.

[226] *See Data Roaming Order* ¶ 85 n.242.

[227] *Data Roaming Order* ¶ 41.

a "data service that is interconnected with the public switched network," and it would not be "utiliz[ing] an in-network switching facility that enables [AT&T] to re-use frequencies and accomplish seamless hand-offs of subscriber calls."[228]

COL 74. Title II common carrier regulation *cannot* apply to these data services. The D.C. Circuit has confirmed that "mobile-data providers are statutorily immune, perhaps twice over, from treatment as common carriers,"[229] and found it "obvious that the Commission would violate the Communications Act were it to regulate broadband providers as common carriers."[230]

COL 75. WCX states no claim under 47 U.S.C. § 301.

COL 76. 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. 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.

COL 77. WCX states no claim under 47 U.S.C. §§ 157(a) and 1302.

COL 78. Neither Section 157(a) nor Section 1302 provides a private right of action for WCX to bring claims against AT&T.

COL 79. 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

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[228] Title II "automatic roaming" obligations apply only to "CMRS carriers if such carriers offer real-time, two-way switched voice or data *service that is interconnected with the public switched network* and utilizes an in-network switching facility that enables the carrier to re-use frequencies and accomplish seamless hand-offs of subscriber calls." 47 C.F.R. § 20.12(a)(2) (emphasis added).

[229] *Cellco*, 700 F.3d at 538.

[230] *Verizon*, 740 F.3d at 650; *see Cellco*, 700 F.3d at 545 ("the Commission concedes that . . . it has no authority to treat mobile-data providers like Verizon as common carriers").

all Americans," *id.* § 1302(a). Neither of these provisions imposes any substantive obligations on AT&T or authorizes WCX to file a suit before the Commission based on a "violation" of their terms.

COL 80. General statements of congressional goals in Sections 157(a) and 1302 cannot impose common carrier obligations on AT&T because that would contradict the specific limitations in the Communications Act.[231]

COL 81. WCX states no claim under 47 U.S.C. § 254. Section 254 sets forth a variety of obligations that relate to the Commission's universal service funding programs, but WCX has not identified any possible theory under which AT&T's proposed contractual terms here would be in violation of its contribution or other obligations under Section 254.

COL 82. The Complaint of Worldcall Interconnect, Inc. a/k/a Evolve Broadband fails to state a claim upon which relief can be granted.

[231] *See Verizon*, 740 F.3d at 649-50 (holding that Commission cannot exercise authority under § 1302 "in a manner that contravenes any specific prohibition contained in the Communications Act"); *Comcast Corp.* v. *FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010) ("policy statements alone cannot provide the basis for the Commission's exercise of ancillary authority").

* * *

Dated: November 5, 2014

Respectfully submitted,

AT&T MOBILITY LLC

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TAB 8

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 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	)	

INFORMATION DESIGNATION PURSUANT TO
RULES 1.724(f)(1), (2), (3), AND 1.724(g)

AT&T Mobility LLC ("AT&T") submits this information designation in accordance with Sections 1.724f(1), (2), (3) and 1.724(g) of the Federal Communication Commission's (the "Commission") Rules, 47 C.F.R. §§ 1.724(f)(1), (2), (3), and 1.724(g).

Individuals Believed to Have First Hand Knowledge, Rule 1.724(f)(1)

Pursuant to Section 1.724(f)(1) of the Commission's Rules, 47 C.F.R. § 1.724(f)(1), set forth below are the names, addresses and positions of the individuals who have first-hand knowledge of facts alleged with particularity in the Answer, and a description of the facts within any such individual's knowledge.

1. George Meadors
   Assistant Vice President of Alliance/Partnership, Wireless Roaming Strategy
   AT&T Mobility LLC
   1025 Lenox Park Blvd. N.E.
   Suite D882
   Atlanta, GA 30319

Subjects: Subject matter further described in more detail in the Declaration of Gram Meadors, including the factual assertions set forth in the Answer.

2. Jonathan Orszag
   Senior Managing Director
   Compass Lexecon LLC
   777 South Flagler Drive
   Suite 1500 - West Tower
   West Palm Beach, FL 33401

   Subjects: Subject matter further described in more detail in the Declaration of Jonathan Orszag, including the terms and provisions of the data roaming agreements proposed by AT&T and WCX; the terms and provisions of data roaming agreements between AT&T and other carriers; AT&T's negotiating practices with customers who seek agreements; the Commission's *Data Roaming Order*, including the "commercially reasonable" standard established thereunder; the marketplace in which AT&T offers data services; the historic evolution of and current trends in the wireless industry; and the operations, mechanics, and components of wireless devices and technology.

3. Michael Prise
   Distinguished Member of Technical Staff, Subscriber Product Engineering Group
   AT&T Labs
   7277 164th Ave. NE
   Redmond, WA 98052

   Subjects: Subject matter further described in more detail in the Declaration of Michael Prise, including potential roaming partners for WCX; and proposal for 3rd Generation Partnership Project ("3GPP") to adopt Band 17 for technical reasons.

4. Lowell Feldman
   CEO
   Worldcall Interconnect, Inc.
   1250 South Capital of Texas, Building 2-235
   West Lake Hills, TX 78746

   Subjects: Parties' negotiations, mediation, and settlement efforts.

Documents, Date Compilations, and Tangible Things, Rule 1.724(f)(2)

Pursuant to Section 1.724(f)(2) of the Commission's Rules, 47 C.F.R. § 1.724(f)(2), attached is a log describing the non-privileged documents, data compilations, and tangible things that are relevant to the facts alleged with particularity in the Answer.

AT&T notes that WCX's Complaint filing on September 8, 2014, contained copies of much of the email correspondence listed on AT&T's log. To avoid burdening the record, AT&T has not filed additional copies of that correspondence. However, AT&T is willing, upon request, to provide the Commission with copies of that correspondence.

AT&T further notes that many of the documents on the log contain Confidential Information (the Parties' email correspondence, Log Nos. 1-147, and License Purchase Agreements, Log Nos. 285-87) and/or Highly Confidential Information (AT&T's data roaming agreements, Log Nos. 148-228, and backup documents relating to the same, Log Nos. 236-37, 240) as those terms are defined in the Parties' Protective Order. Additionally, the log itself contains Highly Confidential Information (the names of AT&T's domestic data roaming partners), and thus the public version of the log is being filed in redacted form.

Identification of Persons and Documents, Rule 1.724(f)(3)

This information designation was prepared by AT&T's outside counsel, Sidley Austin LLP, in cooperation with AT&T's in-house counsel and AT&T's employees. Sidley Austin LLP, in coordination with AT&T's in-house counsel, identified the individuals who have first-hand knowledge of the relevant facts. The materials set forth in the document log were collected from the following sources: the files of George Meadors, including his correspondence with WCX; the data roaming contract files of AT&T's Wireless Roaming Strategy Group; and the source materials relied on by Mr. Orszag and Mr. Prise in their respective Declarations. Mr. Orszag and his team at Compass Lexecon LLC collected the public source materials cited in Mr. Orszag's Declaration. Mr. Prise and Sidley Austin LLP collected the public source materials cited in Mr. Prise's Declaration.

Documents Relied Upon, Rule 1.724(g)

In accordance with Section 1.724(g)(1) of the Commission's Rules, 47 C.F.R. § 1.724(g)(1), copies of the affidavits, documents, data compilations, and tangible things in AT&T's possession, custody or control upon which AT&T relies or intends to rely to support the facts alleged and legal arguments made in its Answer are attached as exhibits to the Answer and have been served, along with the Answer, upon WCX's counsel.

Dated: November 5, 2014

Respectfully submitted,

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PUBLIC VERSION

In the Matter of Worldcall Interconnect, Inc. v. AT&T Mobility LLC, No. EB-14-MD-011
Exhibit to Information Designation: Relevant Documents Pursuant to 47 C.F.R. § 1.724(f)(2)

Doc. No.	Date	Author, Preparer, or Other Source	To	CC	Relevance
1	06/01/2011	Lowell Feldman	Michael W. White	Raoul Pio Castro	Correspondence initiating negotiations between AT&T and Wordcall concerning roaming agreement
2	06/01/2011				Attachment to correspondence initiating negotiations between AT&T and Wordcall concerning roaming agreement.
3	06/01/2011	Raoul Pio Castro	Lowell Feldman; Michael W. White	Michael B. Wheat; Adrienne E. Gibson; Deepa Devaraj	Correspondence initiating negotiations between AT&T and Wordcall concerning roaming agreement
4	06/01/2011				Attachment to correspondence initiating negotiations between AT&T and Wordcall concerning roaming agreement.
5	06/07/2011	Lowell Feldman	George Meadors	Cameron Dunn	Correspondence initiating negotiations between AT&T and Wordcall concerning roaming agreement
6	06/22/2011	Lowell Feldman	George Meadors	Cameron Dunn	Correspondence regarding non-disclosure agreement between AT&T and Wordcall for negotiations relating to roaming agreement, and regarding field strength agreement between the parties.
7	06/22/2011				Attachment to correspondence regarding non-disclosure agreement between AT&T and Wordcall for negotiations relating to roaming agreement, and regarding field strength agreement between the parties
8	06/24/2011	Lowell Feldman	George Meadors	Cameron Dunn	Correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement
9	06/24/2011				Attachment to correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement.
10	06/24/2011	Lowell Feldman	George Meadors	Cameron Dunn	Correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement
11	06/24/2011				Attachment to correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement.
12	06/24/2011				Attachment to correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement.
13	06/24/2011	Cameron Dunn	Lowell Feldman; George Meadors		Correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement
14	06/28/2011	Lowell Feldman	George Meadors		Correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement
15	07/01/2011	George Meadors	Lowell Feldman		Correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement
16	07/07/2011	George Meadors	Lowell Feldman		Correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement
17	07/08/2011	Lowell Feldman	George Meadors		Correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement
18	07/08/2011	George Meadors	Lowell Feldman		Correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement
19	07/08/2011	George Meadors	Lowell Feldman		Correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement
20	07/20/2011	George Meadors	Lowell Feldman		Correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement
21	07/20/2011	George Meadors	Lowell Feldman		Correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement
22	07/20/2011				Attachment to correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement.
23	07/20/2011				Attachment to correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement.
24	07/20/2011	Lowell Feldman	George Meadors		Correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement

Copies of all documents are located at and available through Counsel for AT&T

Doc. No.	Date	Author, Preparer, or Other Source	To	CC	Relevance
25	07/20/2011	George Meadors	Lowell Feldman		Correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement
26	08/01/2011	George Meadors	Lowell Feldman		Correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement
27	08/01/2011				Attachment to correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement.
28	08/03/2011	Joe Hoerl	George Meadors	Lowell Feldman; Soren Telfer; Steve Jackson; Dean D. Holness	Correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement.
29	08/04/2011	George Meadors	Lowell Feldman	Brian J. Keller; Joe Hoerl; Soren Telfer; Cameron Dunn	Correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement
30	08/08/2011	George Meadors	Lowell Feldman		Correspondence regarding non-disclosure agreement between AT&T and Wordcall for negotiations relating to roaming agreement.
31	08/08/2011				Attachment to correspondence regarding non-disclosure agreement between AT&T and Wordcall for negotiations relating to roaming agreement.
32	08/09/2011	Lowell Feldman	George Meadors		Correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement
33	08/09/2011				Attachment to correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement.
34	08/10/2011	Lowell Feldman	George Meadors		Correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement
35	08/10/2011				Attachment to correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement.
36	08/15/2011	George Meadors	Lowell Feldman		Correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement
37	09/21/2011	Lowell Feldman	George Meadors	Scott McCollough; Michael Goggin	Correspondence regarding anticipating the filing of an FCC complaint concerning issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
38	09/23/2011	Scott McCollough	George Meadors		Correspondence regarding anticipating the filing of an FCC complaint concerning issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
39	10/03/2011	Michael Goggin	Matthew Henry	George Meadors	Correspondence regarding anticipating the filing of an FCC complaint concerning issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
40	10/03/2011				Attachment to correspondence regarding anticipating the filing of an FCC complaint concerning issues arising between AT&T and Wordcall from negotiations relating to roaming agreement
41	10/04/2011	Matthew Henry	Michael Goggin	George Meadors; Lowell Feldman	Correspondence regarding anticipating the filing of an FCC complaint concerning issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
42	10/04/2011				Attachment to correspondence regarding anticipating the filing of an FCC complaint concerning issues arising between AT&T and Wordcall from negotiations relating to roaming agreement
43	10/04/2011	Michael Goggin	Matthew Henry	George Meadors; Lowell Feldman	Correspondence regarding anticipating the filing of an FCC complaint concerning issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
44	10/06/2011	Lowell Feldman	George Meadors; Michael Goggin	Matthew Henry	Correspondence regarding non-disclosure agreement between AT&T and Wordcall for negotiations relating to roaming agreement, and regarding field strength agreement between the parties.
45	10/06/2011				Attachment to correspondence regarding non-disclosure agreement between AT&T and Wordcall for negotiations relating to roaming agreement, and regarding field strength agreement between the parties

Doc. No.	Date	Author, Preparer, or Other Source	To	CC	Relevance
46	10/07/2011	George Meadors	Lowell Feldman		Correspondence regarding non-disclosure agreement between AT&T and Wordcall for negotiations relating to roaming agreement.
47	10/07/2011				Attachment to correspondence regarding non-disclosure agreement between AT&T and Wordcall for negotiations relating to roaming agreement.
48	10/07/2011				Attachment to correspondence regarding non-disclosure agreement between AT&T and Wordcall for negotiations relating to roaming agreement.
49	10/07/2011	Lowell Feldman	George Meadors		Correspondence regarding non-disclosure agreement between AT&T and Wordcall for negotiations relating to roaming agreement.
50	10/07/2011				Attachment to correspondence regarding non-disclosure agreement between AT&T and Wordcall for negotiations relating to roaming agreement.
51	10/10/2011	George Meadors	Lowell Feldman		Correspondence regarding non-disclosure agreement between AT&T and Wordcall for negotiations relating to roaming agreement.
52	10/10/2011				Attachment to correspondence regarding non-disclosure agreement between AT&T and Wordcall for negotiations relating to roaming agreement.
53	10/10/2011	Lowell Feldman	George Meadors		Correspondence regarding non-disclosure agreement between AT&T and Wordcall for negotiations relating to roaming agreement.
54	10/10/2011				Attachment to correspondence regarding non-disclosure agreement between AT&T and Wordcall for negotiations relating to roaming agreement.
55	10/11/2011	Michael Goggin	Matthew Henry	Lowell Feldman; George Meadors; Jeanine Poltronieri; Anisa A. Latif	Correspondence regarding anticipating the filing of an FCC complaint concerning issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
56	10/11/2011	Matthew Henry	Alex Starr	Michael Goggin; George Meadors	Correspondence with the FCC concerning issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
57	10/13/2011	Matthew Henry	Alex Starr	Michael Goggin; George Meadors; Lisa Saks; Rosemary McEnery	Correspondence with the FCC concerning mediating issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
58	10/14/2011	Matthew Henry	Alex Starr	Michael Goggin; George Meadors; Lisa Saks; Rosemary McEnery	Correspondence with the FCC concerning mediating issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
59	10/14/2011				Attachment to correspondence with the FCC concerning mediating issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
60	11/10/2011	Lisa Saks	Matthew Henry; Michael Goggin; George Meadors	Lisa Boehley	Correspondence with the FCC concerning mediating issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
61	11/10/2011				Attachment to correspondence with the FCC concerning mediating issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
62	11/21/2011	Matthew Henry	Lisa Saks; Lisa Boehley	Michael Goggin; George Meadors; Scott McCollough	Correspondence with the FCC concerning mediating issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
63	11/21/2011				Attachment to correspondence with the FCC concerning mediating issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
64	11/21/2011				Attachment to correspondence with the FCC concerning mediating issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.

Doc. No.	Date	Author, Preparer, or Other Source	To	CC	Relevance
65	11/21/2011	Michael Goggin	Lisa Saks	Lisa Boehley; Matthew Henry	Correspondence with the FCC concerning mediating issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
66	12/05/2011	Lisa Boehley	Matthew Henry; George Meadors; Scott McCollough; Michael Goggin	Alex Starr; Lisa Saks	Correspondence with the FCC concerning mediating issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
67	12/05/2011				Attachment to correspondence with the FCC concerning mediating issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
68	12/06/2011	Lisa Boehley	Anisa A. Latif; Michael Goggin; Scott McCollough; Matthew Henry; George Meadors	Alex Starr; Lisa Saks	Correspondence with the FCC concerning mediating issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
69	12/08/2011	Lisa Boehley	Matthew Henry	George Meadors; Michael Goggin; Scott McCollough; Alex Starr; Lisa Saks	Correspondence with the FCC concerning mediating issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
70	12/08/2011	Matthew Henry	Michael Goggin		Correspondence relating to the FCC's mediation of issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
71	12/08/2011	Lisa Boehley	Michael Goggin	George Meadors; Scott McCollough; Matthew Henry; Lisa Saks; Alex Starr	Correspondence with the FCC concerning mediating issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
72	12/08/2011	Matthew Henry	Michael Goggin		Correspondence regarding non-disclosure agreement between AT&T and Wordcall for negotiations relating to roaming agreement.
73	12/08/2011				Attachment to correspondence regarding non-disclosure agreement between AT&T and Wordcall for negotiations relating to roaming agreement.
74	12/12/2011	Matthew Henry	Michael Goggin	Anisa A. Latif; Lowell Feldman	Correspondence relating to the FCC's mediation of issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
75	12/20/2011	Lowell Feldman	George Meadors		Correspondence relating to the FCC's mediation of issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
76	01/05/2012	Matthew Henry	Anisa A. Latif; Lowell Feldman	Michael Goggin; Jeanine Poltronieri; George Meadors; Matthew Henry	Correspondence regarding negotiations between AT&T and Wordcall concerning resale agreement.
77	01/05/2012	Lowell Feldman	Anisa A. Latif	Michael Goggin; Jeanine Poltronieri; George Meadors; Matthew Henry	Correspondence regarding negotiations between AT&T and Wordcall concerning resale agreement.
78	01/13/2012	Anisa A. Latif	Matthew Henry; Lowell Feldman	Michael Goggin; George Meadors; Jeanine Poltronieri	Correspondence regarding negotiations between AT&T and Wordcall concerning resale agreement.
79	01/17/2012	Lane C. Mansell	Lowell Feldman; Matthew Henry	Jeanine Poltronieri; Michael Goggin; George Meadors; Parkey J. Haggman; Anisa A. Latif	Correspondence regarding negotiations between AT&T and Wordcall concerning resale agreement.
80	01/18/2012	Lisa Boehley	Anisa A. Latif; Lowell Feldman; Lisa Saks	Michael Goggin; George Meadors; Jeanine Poltronieri; Matthew Henry	Correspondence with the FCC regarding negotiations between AT&T and Wordcall concerning resale agreement.
81	01/18/2012	George Meadors	Lowell Feldman	Matthew Henry; Jeanine Poltronieri; Michael Goggin; Anisa A. Latif	Correspondence regarding negotiations between AT&T and Wordcall concerning roaming agreement.
82	02/07/2012	Lisa Boehley	Anisa A. Latif; Michael Goggin; Matthew Henry; Lowell Feldman; George Meadors; Jeanine Poltronieri	Alex Starr; Lisa Saks	Correspondence with the FCC concerning mediating issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.

Doc. No.	Date	Author, Preparer, or Other Source	To	CC	Relevance
83	02/08/2012	Lisa Saks	Anisa A. Latif; Michael Goggin; Matthew Henry; Lowell Feldman; George Meadors; David Lawson	Alex Starr; Lisa Boehley	Correspondence with the FCC regarding anticipating the filing of a complaint concerning issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
84	02/08/2012				Attachment to correspondence with the FCC regarding anticipating the filing of a complaint concerning issues arising between AT&T and Wordcall from negotiations relating to roaming agreement
85	04/24/2012	Lisa Boehley	Matthew Henry; David Lawson; Anisa A. Latif; Michael Goggin; Lowell Feldman; George Meadors	Alex Starr; Lisa Saks	Correspondence with the FCC regarding anticipating the filing of a complaint concerning issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
86	05/02/2012	Matthew Henry	Lisa Boehley; Lisa Saks; Alex Starr	Michael Goggin; David Lawson	Correspondence with the FCC regarding anticipating the filing of a complaint concerning issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
87	05/02/2012				Attachment to correspondence with the FCC regarding anticipating the filing of a complaint concerning issues arising between AT&T and Wordcall from negotiations relating to roaming agreement
88	05/16/2012	David Lawson	Alex Starr; Lisa Saks; Lisa Boehley	Matthew Henry	Correspondence with the FCC regarding anticipating the filing of a complaint concerning issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
89	05/16/2012	David Lawson	Alex Starr; Lisa Saks; Lisa Boehley	Matthew Henry	Correspondence with the FCC regarding anticipating the filing of a complaint concerning issues arising between AT&T and Wordcall from negotiations relating to roaming agreement.
90	05/16/2012				Attachment to correspondence with the FCC regarding anticipating the filing of a complaint concerning issues arising between AT&T and Wordcall from negotiations relating to roaming agreement
91	01/18/2013	Dennis Friedman	Scott McCollough		Correspondence regarding renewing negotiations between AT&T and Wordcall concerning roaming agreement
92	06/24/2014	Lowell Feldman	George Meadors	Lowell Feldman	Correspondence regarding renewing negotiations between AT&T and Wordcall concerning roaming agreement
93	06/24/2014				Attachment to correspondence regarding renewing negotiations between AT&T and Wordcall concerning roaming agreement
94	06/27/2014	Lowell Feldman	George Meadors	Lowell Feldman	Correspondence regarding renewing negotiations between AT&T and Wordcall concerning roaming agreement
95	07/01/2014	Lowell Feldman	George Meadors	Lowell Feldman	Correspondence regarding renewing negotiations between AT&T and Wordcall concerning roaming agreement
96	07/02/2014	George Meadors	Lowell Feldman		Correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement, and regarding a non-disclosure agreement between the parties.
97	07/02/2014				Attachment to correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement, and regarding a non-disclosure agreement between the parties.
98	07/03/2014	Lowell Feldman	George Meadors	Lowell Feldman	Correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement, and regarding a non-disclosure agreement between the parties.
99	07/03/2014				Attachment to correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement, and regarding a non-disclosure agreement between the parties.
100	07/03/2014				Attachment to correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement, and regarding a non-disclosure agreement between the parties.
101	07/03/2014				Attachment to correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement, and regarding a non-disclosure agreement between the parties.

Doc. No.	Date	Author, Preparer, or Other Source	To	CC	Relevance
102	07/10/2014	George Meadors	Lowell Feldman		Correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement, and regarding a non-disclosure agreement between the parties.
103	07/10/2014				Attachment to correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement, and regarding a non-disclosure agreement between the parties.
104	07/10/2014				Attachment to correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement, and regarding a non-disclosure agreement between the parties.
105	07/10/2014	Lowell Feldman	George Meadors		Correspondence regarding non-disclosure agreement between AT&T and Wordcall for renewed negotiations relating to roaming agreement
106	07/11/2014	George Meadors	Lowell Feldman		Correspondence regarding non-disclosure agreement between AT&T and Wordcall for renewed negotiations relating to roaming agreement
107	07/17/2014	Lowell Feldman	George Meadors		Correspondence regarding non-disclosure agreement between AT&T and Wordcall for renewed negotiations relating to roaming agreement
108	07/17/2014				Attachment to correspondence regarding non-disclosure agreement between AT&T and Wordcall for renewed negotiations relating to roaming agreement.
109	07/17/2014				Attachment to correspondence regarding non-disclosure agreement between AT&T and Wordcall for renewed negotiations relating to roaming agreement.
110	07/21/2014	Lowell Feldman	Scott McCollough	George Meadors	Correspondence regarding non-disclosure agreement between AT&T and Wordcall for renewed negotiations relating to roaming agreement
111	07/21/2014				Attachment to correspondence regarding non-disclosure agreement between AT&T and Wordcall for renewed negotiations relating to roaming agreement.
112	07/21/2014				Attachment to correspondence regarding non-disclosure agreement between AT&T and Wordcall for renewed negotiations relating to roaming agreement.
113	07/24/2014	George Meadors	Scott McCollough	Lowell Feldman; Jack S. Zinman; Kelly Romich	Correspondence regarding non-disclosure agreement between AT&T and Wordcall for renewed negotiations relating to roaming agreement
114	07/24/2014				Attachment to correspondence regarding non-disclosure agreement between AT&T and Wordcall for renewed negotiations relating to roaming agreement.
115	07/24/2014	George Meadors	Scott McCollough	Lowell Feldman; Jack S. Zinman	Correspondence regarding non-disclosure agreement between AT&T and Wordcall for renewed negotiations relating to roaming agreement
116	07/24/2014				Attachment to correspondence regarding non-disclosure agreement between AT&T and Wordcall for renewed negotiations relating to roaming agreement.
117	07/25/2014	Scott McCollough	Jack S. Zinman		Correspondence regarding non-disclosure agreement between AT&T and Wordcall for renewed negotiations relating to roaming agreement
118	07/25/2014	Scott McCollough	Jack S. Zinman; Lowell Feldman; George Meadors		Correspondence regarding non-disclosure agreement between AT&T and Wordcall for renewed negotiations relating to roaming agreement
119	07/25/2014				Attachment to correspondence regarding non-disclosure agreement between AT&T and Wordcall for renewed negotiations relating to roaming agreement.
120	07/28/2014	George Meadors	Lowell Feldman	Scott McCollough; Jack S. Zinman; Kelly Romich	Correspondence regarding non-disclosure agreement between AT&T and Wordcall for renewed negotiations relating to roaming agreement
121	07/28/2014				Attachment to correspondence regarding non-disclosure agreement between AT&T and Wordcall for renewed negotiations relating to roaming agreement.
122	07/28/2014	Lowell Feldman	George Meadors	Scott McCollough	Correspondence regarding non-disclosure agreement between AT&T and Wordcall for renewed negotiations relating to roaming agreement

Doc. No.	Date	Author, Preparer, or Other Source	To	CC	Relevance
123	07/28/2014				Attachment to correspondence regarding non-disclosure agreement between AT&T and Wordcall for renewed negotiations relating to roaming agreement.
124	07/29/2014	George Meadors	Lowell Feldman		Correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement
125	07/29/2014				Attachment to correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement
126	07/29/2014				Attachment to correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement
127	07/29/2014	Lowell Feldman	George Meadors		Correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement
128	07/29/2014				Attachment to correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement
129	08/01/2014	Lowell Feldman	George Meadors		Correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement
130	08/05/2014	Lowell Feldman	Jack S. Zinman; George Meadors	Scott McCollough; Lowell Feldman	Correspondence regarding anticipating the filing of an FCC complaint concerning issues arising between AT&T and Wordcall from renewed negotiations relating to roaming agreement
131	08/05/2014				Attachment to correspondence regarding anticipating the filing of an FCC complaint concerning issues arising between AT&T and Wordcall from renewed negotiations relating to roaming agreement
132	08/08/2014	Jack S. Zinman	Scott McCollough	George Meadors	Correspondence regarding anticipating the filing of an FCC complaint concerning issues arising between AT&T and Wordcall from renewed negotiations relating to roaming agreement
133	08/08/2014				Attachment to correspondence regarding anticipating the filing of an FCC complaint concerning issues arising between AT&T and Wordcall from renewed negotiations relating to roaming agreement
134	08/14/2014	Jack S. Zinman	Scott McCollough	George Meadors; Lowell Feldman	Correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement
135	08/14/2014				Attachment to correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement
136	08/15/2014	Scott McCollough	Jack S. Zinman	George Meadors; Lowell Feldman	Correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement
137	08/15/2014				Attachment to correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement
138	08/18/2014	Jack S. Zinman	Scott McCollough; Lowell Feldman	George Meadors	Correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement
139	08/19/2014	Scott McCollough	Jack S. Zinman	George Meadors; Lowell Feldman	Correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement
140	08/20/2014	Lowell Feldman	George Meadors	Lowell Feldman	Correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement
141	08/20/2014				Attachment to correspondence regarding renewed negotiations between AT&T and Wordcall concerning roaming agreement
142	08/25/2014	Jack S. Zinman	Scott McCollough	George Meadors; Lowell Feldman	Correspondence regarding anticipating the filing of an FCC complaint concerning issues arising between AT&T and Wordcall from renewed negotiations relating to roaming agreement
143	09/08/2014	Lowell Feldman	Lisa Saks	Anisa A. Latif; David Lawson; Scott McCollough; Matthew Henry; Lowell Feldman; George Meadors; Rosemary McEnery; Lisa Griffin; Lisa Boehley	Correspondence with the FCC regarding the filing of a complaint concerning issues arising between AT&T and Wordcall from renewed negotiations relating to roaming agreement.

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144	09/08/2014				Attachment to correspondence with the FCC regarding the filing of a complaint concerning issues arising between AT&T and Wordcall from renewed negotiations relating to roaming agreement
145	09/08/2014	Lisa Saks	Lowell Feldman	Anisa A. Latif; David Lawson; Scott McCollough; Matthew Henry; George Meadors; Rosemary McEnery; Lisa Griffin; Lisa Boehley	Correspondence with the FCC regarding the filing of a complaint concerning issues arising between AT&T and Wordcall from renewed negotiations relating to roaming agreement.
146	09/10/2014	Lowell Feldman	Lisa Boehley	David Lawson; Scott McCollough; Matthew Henry; George Meadors; Rosemary McEnery; Lisa Griffin; Michael Goggin; Jacquelyne Flemming; Lisa Saks	Correspondence with the FCC regarding the filing of a complaint concerning issues arising between AT&T and Wordcall from renewed negotiations relating to roaming agreement.
147	09/11/2014	Lisa Boehley	Scott McCollough	Rosemary McEnery; Lisa Griffin; Lisa Saks; Jacquelyne Flemming; Michael Goggin; David Lawson; George Meadors; Lowell Feldman; Henry, Matthew Henry	Correspondence with the FCC regarding the filing of a complaint concerning issues arising between AT&T and Wordcall from renewed negotiations relating to roaming agreement.
148	7/1/2011	AT&T Wireless Roaming Strategy Group			[redacted]
149	5/1/2014	AT&T Wireless Roaming Strategy Group			[redacted]
150	4/15/2013	AT&T Wireless Roaming Strategy Group			[redacted]
151	9/15/2013	AT&T Wireless Roaming Strategy Group			[redacted]
152	5/25/2011	AT&T Wireless Roaming Strategy Group			[redacted]
153	9/8/2006	AT&T Wireless Roaming Strategy Group			[redacted]
154	2/29/2008	AT&T Wireless Roaming Strategy Group			[redacted]
155	4/6/2010	AT&T Wireless Roaming Strategy Group			[redacted]
156	3/22/2013	AT&T Wireless Roaming Strategy Group			[redacted]

Doc. No.	Date	Author, Preparer, or Other Source	To	CC	Relevance
157	1/1/2009	AT&T Wireless Roaming Strategy Group			[redacted]
158	5/6/2011	AT&T Wireless Roaming Strategy Group			
159	7/1/2012	AT&T Wireless Roaming Strategy Group			
160	6/25/2003	AT&T Wireless Roaming Strategy Group			
161	3/26/2007	AT&T Wireless Roaming Strategy Group			
162	6/30/2008	AT&T Wireless Roaming Strategy Group			
163	2/8/2010	AT&T Wireless Roaming Strategy Group			
164	5/11/2011	AT&T Wireless Roaming Strategy Group			
165	3/29/2013	AT&T Wireless Roaming Strategy Group			
166	4/28/2006	AT&T Wireless Roaming Strategy Group			
167	3/24/2003	AT&T Wireless Roaming Strategy Group			
168	6/1/2007	AT&T Wireless Roaming Strategy Group			
169	1/1/2014	AT&T Wireless Roaming Strategy Group			
170	1/22/2013	AT&T Wireless Roaming Strategy Group			

Doc. No.	Date	Author, Preparer, or Other Source	To	CC	Relevance
171	3/27/2013	AT&T Wireless Roaming Strategy Group			[redacted]
172	3/1/2014	AT&T Wireless Roaming Strategy Group			[redacted]
173	5/7/2014	AT&T Wireless Roaming Strategy Group			[redacted]
174	5/25/2007	AT&T Wireless Roaming Strategy Group			[redacted]
175	6/7/2011	AT&T Wireless Roaming Strategy Group			[redacted]
176	3/20/2013	AT&T Wireless Roaming Strategy Group			[redacted]
177	3/28/2011	AT&T Wireless Roaming Strategy Group			[redacted]
178	10/17/2002	AT&T Wireless Roaming Strategy Group			[redacted]
179	6/9/2008	AT&T Wireless Roaming Strategy Group			[redacted]
180	12/20/2013	AT&T Wireless Roaming Strategy Group			[redacted]
181	3/25/2011	AT&T Wireless Roaming Strategy Group			[redacted]
182	8/1/2013	AT&T Wireless Roaming Strategy Group			[redacted]
183	6/8/2011	AT&T Wireless Roaming Strategy Group			[redacted]
184	6/27/2012	AT&T Wireless Roaming Strategy Group			[redacted]
185	1/1/2006	AT&T Wireless Roaming Strategy Group			[redacted]

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186	1/13/2012	AT&T Wireless Roaming Strategy Group			[redacted]
187	4/1/2012	AT&T Wireless Roaming Strategy Group			
188	1/1/2014	AT&T Wireless Roaming Strategy Group			
189	6/17/2014	AT&T Wireless Roaming Strategy Group			
190	2/1/2007	AT&T Wireless Roaming Strategy Group			
191	11/1/2008	AT&T Wireless Roaming Strategy Group			
192	4/1/2014	AT&T Wireless Roaming Strategy Group			
193	8/28/2014	AT&T Wireless Roaming Strategy Group			
194	6/16/2014	AT&T Wireless Roaming Strategy Group			
195	10/9/2012	AT&T Wireless Roaming Strategy Group			
196	4/1/2014	AT&T Wireless Roaming Strategy Group			
197	7/26/2012	AT&T Wireless Roaming Strategy Group			
198	9/1/2012	AT&T Wireless Roaming Strategy Group			
199	1/1/2014	AT&T Wireless Roaming Strategy Group			
200	6/20/2014	AT&T Wireless Roaming Strategy Group			

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201	6/1/2011	AT&T Wireless Roaming Strategy Group			[redacted]
202	1/15/2014	AT&T Wireless Roaming Strategy Group			
203	12/12/2013	AT&T Wireless Roaming Strategy Group			
204	7/12/2013	AT&T Wireless Roaming Strategy Group			
205	5/1/2013	AT&T Wireless Roaming Strategy Group			
206	6/8/2011	AT&T Wireless Roaming Strategy Group			
207	6/25/2008	AT&T Wireless Roaming Strategy Group			
208	7/30/2008	AT&T Wireless Roaming Strategy Group			
209	1/27/2010	AT&T Wireless Roaming Strategy Group			
210	1/29/2010	AT&T Wireless Roaming Strategy Group			
211	1/1/2011	AT&T Wireless Roaming Strategy Group			
212	3/1/2013	AT&T Wireless Roaming Strategy Group			
213	3/1/2013	AT&T Wireless Roaming Strategy Group			
214	8/13/2005	AT&T Wireless Roaming Strategy Group			
215	4/1/2012	AT&T Wireless Roaming Strategy Group			

Doc. No.	Date	Author, Preparer, or Other Source	To	CC	
216	12/1/2009	AT&T Wireless Roaming Strategy Group			[redacted]
217	1/16/2003	AT&T Wireless Roaming Strategy Group			
218	3/1/2007	AT&T Wireless Roaming Strategy Group			
219	3/27/2009	AT&T Wireless Roaming Strategy Group			
220	8/10/2012	AT&T Wireless Roaming Strategy Group			
221	7/8/2013	AT&T Wireless Roaming Strategy Group			
222	3/3/2012	AT&T Wireless Roaming Strategy Group			
223	4/16/2002	AT&T Wireless Roaming Strategy Group			
224	10/26/2009	AT&T Wireless Roaming Strategy Group			
225	4/1/2013	AT&T Wireless Roaming Strategy Group			
226	10/16/2002	AT&T Wireless Roaming Strategy Group			
227	6/1/2008	AT&T Wireless Roaming Strategy Group			
228	2/15/2013	AT&T Wireless Roaming Strategy Group			
229	10/21/2014	http://www.evolvebroadband.com/#/home			Evolve Broadband, "Special Promotions" – Evidence disproving that AT&T is the only potential roaming partner for WCX

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230	9/5/2014	Phil Goldstein http://www.fiercewireless.com/story/sprint-add-700-mhz-band-12-capabilities-some-new-devices-starting-next-year/2014-03-26			Article, Sprint adds 15 rural carriers to LTE roaming program, FierceWireless (Sept. 5, 2014) -- Evidence disproving that AT&T is the only potential roaming partner for WCX
231	9/10/2014	http://cca-convention.org/category/newsroom/			Press Release, CCA Annual Convention Kicks Off with Focus on LTE -- Evidence disproving that AT&T is the only potential roaming partner for WCX
232		http://investor.t-mobile.com/Cache/1001189365.PDF?Y=&O=PDF&D=&fid=1001189365&T=&iid=4091145			T-Mobile, US Q2 2014 Earnings, Slide Presentation -- Evidence disproving that AT&T is the only potential roaming partner for WCX
233	9/10/2014	Sascha Segan (PC Magazine) http://www.pcmag.com/article2/0,2817,2468252,00.asp			Article, T-Mobile Doubles Down on Wi-Fi Calling; In an exclusive interview, T-Mobile's CTO says high-quality calling is coming soon -- Evidence disproving that AT&T is the only potential roaming partner for WCX
234	4/5/2008	http://www.3gpp.org/ftp/tsg_ran/WG4_Radio/TSGR4_47/Docs/R4-081108.zip			Motorola, TS36.101: Lower 700 MHz Band 15, R4-081108, 3GPP TSG RAN WG4 (Radio) Meeting # 47, Kansas City -- Evidence disproving that AT&T unilaterally introduced Band 17, without authorization
235	11/5/2014	Michael Prise			LTE Bands Supported By Devices Offered By AT&T -- Evidence disproving that AT&T is the only potential roaming partner for WCX
236	9/26/2014	AT&T Wireless Roaming Strategy Group			Consolidated Domestic IC Roam Trend -- Reasonableness of AT&T's Proposed Data Roaming Rate
237	9/26/2014	AT&T Wireless Roaming Strategy Group			Consolidated Domestic OC Roam Trend -- Reasonableness of AT&T's Proposed Data Roaming Rate
238	9/17/2014	FCC's Spectrum Dashboard and Universal Licensing System			Chart of Radio Coverage for CMA667 -- Examination of WCX's Other Roaming Options
239	9/17/2014	FCC's Spectrum Dashboard and Universal Licensing System			Chart of Radio Coverage for CMAs 10, 33, 75, & 667 -- Examination of WCX's Other Roaming Options
240	8/1/2014	AT&T Wireless Roaming Strategy Group			Domestic Budget Detail -- Reasonableness of AT&T's Proposed Data Roaming Rate
241	2005	Dennis W. Carlton Jeffrey M Perloff			Modern Industrial Organization, 4th Edition -- Reasonableness of AT&T's Proposed Usage and Resale Restrictions
242	2003	Michael Kende			"The Digital Handshake: Connecting Internet Backbones", Commlaw Conspectus, Vol. 11 -- Reasonableness of AT&T's Proposed Usage and Resale Restrictions
243	Fall 1998	Rob Frieden			"Without Public Peer: The Potential Regulatory and Universal Service Consequences of Internet Balkanization," Virginia Journal of Law and Technology Association -- Reasonableness of AT&T's Proposed Usage and Resale Restrictions
244	5/1/2003	Daniel F. Spulber Christopher Yoo			"Access to Networks: Economics and Constitutional Connections," Cornell Law Review, No. 88:4 -- Reasonableness of AT&T's Proposed Usage and Resale Restrictions
245	10/22/2014	http://www.4gltemall.com/bandluxe-r500-4g-lte-tdd-fdd-voip-wifi-router.html			4G Mobile Broadband Shopping Mall, "BandLuxe R500 4G LTE TDD FDD VoIP WiFi Router" -- Examination of WCX's Other Roaming Options
246	10/23/2014	http://www.att.com/devices/netgear/beam.html			AT&T Beam Specifications -- Examination of WCX's Other Roaming Options
247	10/13/2014	http://www.att.com/shop/en/legalterms.html?toskey=wirelessCustomerAgreement			AT&T Wireless Customer Agreement -- Assessment of the RWA's Estimation of the "Current Prevailing Retail Rate"

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248	10/20/2014	http://www.att.com/shop/wireless/data-plans.html?#fbid=GoXGnMzYx4w			AT&T Mobile Share Value Plans -- Assessment of the RWA's Estimation of the "Current Prevailing Retail Rate"
249	10/23/2014	http://www.att.com/devices/netgear/unite.html#fbid=WGw7pJI9hJB			AT&T Unite Specifications -- Examination of WCX's Other Roaming Options
250	10/23/2014	http://www.att.com/devices/netgear/unite-pro.html			AT&T Unite Pro Specifications -- Examination of WCX's Other Roaming Options
251	10/23/2014	http://www.amazon.com/Fire_Phone_13MP-Camera_32GB/dp/B00EOE0WKQ			Amazon Fire Phone Technical Details -- Examination of WCX's Other Roaming Options
252	10/23/2014	http://support.apple.com/kb/sp655			Apple iPhone 5 Technical Specifications -- Examination of WCX's Other Roaming Options
253	10/23/2014	https://www.apple.com/iphone-6/specs/			Apple iPhone 6 Technical Specifications -- Examination of WCX's Other Roaming Options
254	10/23/2014	http://www.att.com/maps/wireless-coverage.html#fbid=WGw7pJI9hJB			AT&T Texas Data Coverage Map -- Examination of WCX's Other Roaming Options
255		http://www.ctia.org/docs/default-source/Facts-Stats/ctia_survey_ye_2013_graphics-final.pdf?sfvrsn=2			"Background on CTIA's Wireless Industry Survey," -- Investment by Facilities-Based Providers
256	3/27/2014	http://www.businesswire.com/news/home/20140327005320/en#.VEWC2fnF9qM			Article, "Sprint, Competitive Carriers Association and NetAmerica Alliance Join Forces to Accelerate Deployment and Utilization of 4G LTE across the United States," Business Wire -- Examination of WCX's Other Roaming Options
257	10/20/2014	http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts			CTIA-The Wireless Association, "Wireless Quick Facts: Investment" -- nvestment by Facilities-Based Providers
258	10/22/2014	http://www.evolvebroadband.com/#/services/			Evolve Broadband, "Services" -- Examination of WCX's Other Roaming Options
259	10/23/2014	http://www.phonearena.com/phones/HTC-One-X-LTE_id7376			HTC One X+ LTE, "Specifications" -- Examination of WCX's Other Roaming Options
260	10/20/2014	http://www.netamericaalliance.com/smart			NetAmerica Alliance, "SMART Delivers the Future to Rural America" -- Examination of WCX's Other Roaming Options
261	10/9/2014	http://ruralwireless.org/about-rwa/			Rural Wireless Association, "About RWA" -- Examination of WCX's Other Roaming Options
262	10/23/2014	http://www.samsung.com/us/mobile/cell-phones/SGH-I537ZBAATT			Samsung Galaxy S4, "Full Specifications" -- Examination of WCX's Other Roaming Options
263	10/23/2014	http://coverage.sprint.com/IMPACT.jsp?			Sprint Texas Data Coverage, "Sprint Coverage Check" -- Examination of WCX's Other Roaming Options
264	10/20/2014	http://shop.sprint.com/mysprint/shop/plan/plan_wall.jsp?tabId=pt_data_plans_tab&INTNAV=ATG:HE:DataOnlyPlans			Sprint, "Data Only Plans" -- Examination of WCX's Other Roaming Options
265	6/16/2014	http://newsroom.sprint.com/news-releases/sprint-to-expand-4g-lte-roaming-through-12-newagreements-with-carriers-covering-a-population-of-over-34-million.htm			Sprint, Press Release, "Rural Roaming Preferred Program Accelerates Deployment and Utilization of 4G LTE in Underserved Areas Across the U.S." -- Examination of WCX's Other Roaming Options
266	10/23/2014	http://www.store4g.com/sierra-aircard-754s/			Store 4G, "Sierra Wireless Aircard 754S Router" -- Examination of WCX's Other Roaming Options

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267	10/23/2014	https://www.t-mobile.com/coverage/pcc.aspx/			T-Mobile Texas 3G/4G/LTE Coverage Map, "T-Mobile Personal Coverage Check: 3G/4G/LTE Smartphone Signal Strength" -- Examination of WCX's Other Roaming Options
268	10/23/2014	https://www.tracfone.com/direct/controller.block			"Tracfone: Coverage" -- Examination of WCX's Other Roaming Options
269	10/23/2014	http://www.verizonwireless.com/wcms/consumer/4g-lte.html			Verizon 4G LTE Coverage, "Verizon 4G LTE Data Coverage Maps" -- Examination of WCX's Other Roaming Options
270	5/30/2014	http://www.verizonwireless.com/news/article/2014/05/lte-rural-america-continues-to-grow.html			Verizon Wireless, "LTE in Rural America Continues to Grow" -- Examination of WCX's Other Roaming Options
271	10/20/2014	http://www.verizonwireless.com/wcms/consumer/shop/shop-data-plans/single-line-data-plans.html			Verizon Wireless, "Single Line Plans" -- Examination of WCX's Other Roaming Options
272	10/20/2014	http://www.verizonwireless.com/wcms/consumer/shop/shop-data-plans/more-everything.html			Verizon Wireless, "The MORE Everything Plan" -- Examination of WCX's Other Roaming Options
273	10/30/2014	http://www.worldcall.net/about.html			Worldcall, "About Worldcall" -- Evidence about WCX and its network and services
274	3/19/2010	http://www.bizjournals.com/austin/stories/2010/03/22/story8.html?page=all			Article, "UTEX files for bankruptcy, arbitrator says it owes AT&T $3M, " Austin Business Journal -- Evidence about Lowell Feldman's communications experience
275	10/31/2014	http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=99399469			"Company Overview of UTEX Communications Corp.," Bloomberg Business Week -- Evidence about Lowell Feldman communications experience
276	10/30/2014	http://reboot.fcc.gov/spectrumdashboard			FCC Spectrum Dashboard, "Common Name: Worldcall" -- Evidence about WCX and its network and services
277	10/30/2014	http://www.broadbandmap.gov (Houston)			Nat'l Telecomm. and Info. Admin., "National Broadband Map," Houston -- Evidence disproving that AT&T is the only potential roaming partner for WCX and about WCX and its network and services
278	10/30/2014	http://www.broadbandmap.gov (San Antonio)			Nat'l Telecomm. and Info. Admin., "National Broadband Map," San Antonio -- Evidence disproving that AT&T is the only potential roaming partner for WCX and about WCX and its network and services
279	10/30/2014	http://www.broadbandmap.gov (Austin)			Nat'l Telecomm. and Info. Admin., "National Broadband Map," Austin -- Evidence disproving that AT&T is the only potential roaming partner for WCX and about WCX and its network and services
280	10/31/2014	http://www.broadbandmap.gov (AT&T)			Nat'l Telecomm. and Info. Admin., "National Broadband Map," AT&T -- Evidence disproving that AT&T is the only potential roaming partner for WCX and about WCX and its network and services
281	10/31/2014	http://www.broadbandmap.gov (Verizon)			Nat'l Telecomm. and Info. Admin., "National Broadband Map," Verizon -- Evidence disproving that AT&T is the only potential roaming partner for WCX and about WCX and its network and services
282	10/31/2014	http://www.broadbandmap.gov (Sprint)			Nat'l Telecomm. and Info. Admin., "National Broadband Map," Sprint -- Evidence disproving that AT&T is the only potential roaming partner for WCX and about WCX and its network and services
283	10/31/2014	http://www.broadbandmap.gov (Texas Broadband)			Nat'l Telecomm. and Info. Admin., "National Broadband Map," Texas Broadband -- Evidence disproving that AT&T is the only potential roaming partner for WCX and about WCX and its network and services
284	10/31/2014	http://www.broadbandmap.gov (Ranch Wireless)			Nat'l Telecomm. and Info. Admin., "National Broadband Map," Ranch Wireless, Evidence disproving that AT&T is the only potential roaming partner for WCX and about WCX and its network and services
285	12/20/2012	Worldcall/AT&T			License Purchase Agreement by and between Worldcall Inc. and AT&T Mobility Spectrum LLC -- Evidence of AT&T's other business dealings with WCX

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286	8/16/2013	Worldcall/AT&T			License Purchase Agreement by and between Worldcall Inc. and AT&T Mobility Puerto Rico, Inc. -- Evidence of AT&T's other business dealings with WCX
287	9/2/2014	Worldcall/AT&T			License Purchase Agreement by and between Worldcall Inc. and AT&T Mobility Puerto Rico, Inc. -- Evidence of AT&T's other business dealings with WCX
288	10/31/2014	http://www.att.com/shop/wireless/plans/mobileshare.html			AT&T, "Wireless Plans" -- Reasonableness of AT&T's Proposed Data Roaming Rate
289	10/31/2014	http://www.verizonwireless.com/wcms/consumer/shop/shop-data-plans/more-everything.html#how-it-works			Verizon Wireless, "How The MORE Everything Plan Works" -- Evidence of Commercial Reasonableness of AT&T's Proposed Rates and Terms and Conditions for Data Roaming
290	10/31/2014	http://www.sprint.com/landings/datashare/index.html?INTNAV=ATG:HE:DataShare			Sprint, "The Best Deal in Data just got better" -- Evidence of Commercial Reasonableness of AT&T's Proposed Rates and Terms and Conditions for Data Roaming
291	10/31/2014	http://www.t-mobile.com/cell-phone-plans/family.html#tab-navigation			T-Mobile, "Simple Choice Plan" -- Evidence of Commercial Reasonableness of AT&T's Proposed Rates and Terms and Conditions for Data Roaming
292	10/31/2014	http://www.uscellular.com/uscellular/plans/showPlans.jsp?plan-selector-type=shared&type=plans			U.S. Cellular, "Plans" -- Evidence of Commercial Reasonableness of AT&T's Proposed Rates and Terms and Conditions for Data Roaming
293	07/10/2014	AT&T			Opposition of AT&T, In the Matter of Petition for Expedited Ruling Filed By T-Mobile USA, Inc. Regarding Data Roaming Obligations, WT Docket No. 05-265 -- Significance of Canadian and European roaming rates to this proceeding

TAB 9

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 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	)	

SECTION 1.724(h) CERTIFICATION OF SETTLEMENT DISCUSSIONS

Pursuant to Section 1.724(h) of the Federal Communication Commission's (the "Commission") Rules, 47 C.F.R. § 1.724(h), AT&T Mobility LLC ("AT&T") hereby certifies that it has, in good faith, discussed or attempted to discuss the possibility of settlement with Worldcall Interconnect, Inc. ("WCX") (together with AT&T, the "Parties"), prior to the filing of WCX's formal complaint on September 8, 2014.

As described in more detail in the Declaration of Gram Meadors, WCX initially approached AT&T about a data roaming agreement on June 1, 2011.[1] On July 20, 2011, AT&T provided WCX with a proposed data roaming agreement.[2] The Parties engaged in good-faith negotiations throughout the summer and early fall, but were not able to reach an agreement.[3]

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[1] Meadors Decl. ¶ 15.

[2] *Id*. ¶ 16.

[3] *Id*. ¶ 17.

On October 11, 2011, the Parties sought the Commission's assistance in resolving their disputes.[4] As part of that process, WCX stipulated that AT&T had been negotiating in good faith.[5] The Parties made submissions to the Commission and participated in a full-day negotiating session with the Commission Staff on December 13, 2011.[6] The Parties also held subsequent discussions.[7] However, the Parties did not resolve their differences.[8]

On May 2, 2012, WCX submitted a request to the Commission for permission to file a complaint against AT&T on the Commission's accelerated docket.[9] On May 24, 2012, the Commission denied WCX's request but noted that WCX could file a complaint pursuant to the Commission's rules.[10] WCX did not file a complaint with the Commission at that time.[11] In fact, AT&T heard nothing further from WCX about a proposed data roaming agreement for over two years.[12]

On June 24, 2014, WCX contacted AT&T seeking to reopen the Parties' discussions about a potential data roaming agreement.[13] WCX forwarded a model data roaming agreement, which WCX proposed should serve as the basis of an agreement between AT&T and WCX.[14]

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[4] *Id.* ¶ 18.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* ¶ 19.

[10] *Id.* ¶ 21.

[11] *Id.*

[12] *Id.*

[13] *Id.* ¶ 22.

[14] *Id.*

WCX also indicated that should the Parties not reach an agreement, WCX stood ready to call on the Commission to resolve the Parties' differences.[15]

AT&T responded that it welcomed negotiations but it appeared the Parties continued to disagree on two main issues—*i.e.*, usage restrictions and roaming rates.[16] On July 29, 2014, AT&T provided WCX with a new proposed roaming agreement.[17] However, WCX was not willing to negotiate over AT&T's proposed agreement,[18] and on August 5, 2014, WCX served notice on AT&T that WCX intended to file a formal complaint.[19] The Parties held further discussions but were unable to resolve their differences, particularly with respect to usage restrictions and roaming rates.[20] On September 8, 2014, WCX filed its formal complaint.[21] On October 1, 2014, WCX filed an amended complaint.

* * *

In light of the differences between the Parties on the issues relating to a potential data roaming agreement, which AT&T has been unable to resolve despite negotiating in good faith with WCX, AT&T does not believe that further negotiations would be fruitful.

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[15] *Id*.

[16] *Id*. ¶ 23.

[17] *Id*. ¶ 27.

[18] *Id*. ¶¶ 28-29.

[19] *Id*. ¶ 31.

[20] *Id*. ¶ 34.

[21] *Id*. ¶ 36.

Dated: November 5, 2014

Respectfully submitted,

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TAB 10

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 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	)	

AT&T MOBILITY LLC'S OBJECTIONS TO INTERROGATORIES

Pursuant to Section 1.729 of the Federal Communication Commission's (the "Commission") Rules, 47 C.F.R. § 1.729, AT&T Mobility LLC ("AT&T") hereby submits these objections to the First Set of Interrogatories of Worldcall Interconnect, Inc. a/k/a Evolve Broadband ("WCX").

GENERAL OBJECTIONS

In addition to any specific objections set forth below, AT&T objects generally as follows:

1. AT&T objects generally to any interrogatory to the extent it seeks information protected from disclosure by the attorney-client privilege or other judicially recognized privileges or the attorney work product doctrine.

2. AT&T objects generally to any interrogatory that calls for proprietary and confidential information and/or trade secrets. Notwithstanding this objection, to the extent the Commission determines that discovery of such information is necessary, AT&T is willing to

provide it but only if the Protective Order proposed by the parties in this proceeding is adopted and then only pursuant to its terms related to "Highly Confidential Information."

3. AT&T objects generally to any interrogatory that calls for information that is not in the possession, custody or control of AT&T.

4. AT&T objects generally to any interrogatory to the extent it seeks information that is not both relevant to the material facts in dispute in this proceeding and necessary to the resolution of the dispute, or is otherwise inconsistent with Section 1.729 of the Commission's rules.

OBJECTIONS TO INSTRUCTIONS

1. AT&T objects to Instruction (1) to the extent it purports to require AT&T to provide information that is not presently within its possession, custody, or control.

2. AT&T objects to Instruction (6) to the extent it purports to require AT&T to supplement its responses beyond what is required in Section 1.720(g) of the Commission's rules.

3. AT&T objects to Instruction (7) to the extent it purports to require AT&T to provide information that is not presently within its possession, custody, or control.

4. AT&T objections to Instruction (9) to the extent it purports to require AT&T to seek clarification of interrogatories on the grounds that all interrogatories must be stated with clarity and specificity. To the extent that any of the interrogatories are unclear or ambiguous, AT&T objects to answering them.

5. AT&T objects to Instruction (10) to the extent it purports to require AT&T to seek additional information regarding interrogatories on the grounds that all interrogatories must be stated with clarity and specificity. To the extent that any of interrogatories are incomplete as stated, AT&T objects to answering them.

OBJECTIONS TO DEFINITIONS

1. AT&T objects to Definition (1) to the extent it purports to require AT&T to provide information that is not presently within its possession, custody or control.

2. AT&T objects to Definition (4) for the same reason it objects to Definition (1).

3. AT&T objects to Definition (5) for the same reason it objects to Definition (1).

4. AT&T objects to Definition (7) as overbroad and unduly burdensome in that it requires more information than is necessary for WCX to identify the documents described.

OBJECTIONS TO SPECIFIC INTERROGATORIES

Interrogatory No. 1:

Identify the rates, terms and conditions under which AT&T and Amazon provide and/or license services and technologies to each other.

Objection:

AT&T objects to this interrogatory because it is neither relevant to the material facts in dispute in this proceeding nor necessary to the resolution of the dispute. In its justification for the interrogatory, WCX contends that "AT&T is seeking to prevent [it] from entering into relationships with technology providers." This is plainly not true. In fact, AT&T has no interest in preventing WCX from building such relationships. WCX is free to pursue these endeavors *on its own network*, and AT&T has offered commercially reasonable terms that would allow WCX customers to roam on AT&T's network. *See* Legal Analysis § II. AT&T's proposed terms are simply intended to ensure that WCX's use of AT&T's network is limited to roaming, and that WCX cannot use a data roaming agreement as the basis for building that business on AT&T's network in a manner that is not commercially reasonable and that is not consistent with the Commission's *Data Roaming Order*. *Id.*

Similarly, WCX contends that the information requested is necessary because AT&T seeks to "prevent [it] from entering into MVNO agreements" like the one AT&T has with Amazon. As an initial matter, AT&T does not have an MVNO agreement with Amazon. Meadors Decl. ¶ 41. Nor, for that matter, does AT&T have a roaming agreement with Amazon. Further, as discussed above, AT&T is not trying to prevent WCX from entering into any agreements so long as WCX conducts this business on its own network instead of improperly piggy-backing on AT&T's network.

Because AT&T's relationship with Amazon is irrelevant to the commercial reasonableness of the data roaming agreement AT&T has proposed to WCX, AT&T objects to providing the information requested by this interrogatory.

Interrogatory 2:

This Interrogatory is date-limited: beginning with the effective date of the FCC's *Data Roaming Order* rules and continuing to the present. State (1) the number of requests for LTE data roaming AT&T has received; (2) the number of agreements that have been successfully negotiated as a result of such requests; and, (3) the number of such agreements still in effect. Reference is made to Instruction 2 to these Interrogatories.

Objection:

AT&T agrees with WCX that the data roaming agreements AT&T has reached as a result of arm's-length negotiations with other service providers are highly relevant to the commercial reasonableness of the offers exchanged between AT&T and WCX. AT&T also points out, however, that these agreements are highly commercially sensitive and all include a provision requiring the parties to the agreement protect its confidentiality. A discussion of AT&T's current data roaming agreements is set forth in the declarations of Gram Meadors and Jonathan Orszag. *See* Meadors Decl. ¶¶ 7-11; Orszag Decl. ¶¶ 49-53. AT&T believes this material is sufficient for the resolution of this matter, but it is willing to provide further information regarding the data roaming agreements so long as it is able to do so pursuant to a Protective Order that provides sufficient protection and permits AT&T to meet its confidentiality obligations to its roaming partners.

Interrogatory 3:

Please assume Your proposed Domestic Roaming Agreement as conveyed to WCX is in place between AT&T and WCX and has been implemented. Please Describe the operation of all Facilities that will be used to support an Authorized Roamer using LTE Wireless Services on AT&T's Network. Reference is made to the Definitions and Instruction 2 to these Interrogatories.

Objection:

AT&T objects to this request as overbroad, unduly burdensome, and neither relevant to the material facts in dispute in this proceeding nor necessary to the resolution of the dispute. The level of detail requested by WCX, in additional to being extremely burdensome for AT&T to provide, would reveal proprietary information about how AT&T's network is operated and could expose AT&T to unfair competition and threaten the security of its network. AT&T notes that the extreme overbreadth of this interrogatory is compounded by WCX's proposed definition of Facilities.

Further, and contrary to WCX's justification for requesting it, detailed information about the operation of AT&T's facilities is entirely unnecessary for WCX to assess the commercial reasonableness of AT&T's proposed data roaming agreement. WCX does not need to "fully understand" how AT&T will operationally support roaming. The relevant terms for WCX's purposes are provided in AT&T's proposed roaming agreement. Importantly, those terms are commercially reasonable and the basis for roaming on AT&T's network by dozens of other service providers. Additionally, WCX had the opportunity to exchange information with AT&T regarding the technical details of roaming over the course of their negotiations. Some such information was exchanged as shown in the emails attached to WCX's complaint. If WCX had

specific questions about how the service would be provided, it should have asked then instead of through this overbroad, catch-all request.

Interrogatory No. 4:

This Interrogatory is date-limited: beginning with the effective date of the FCC's *Data Roaming Order* rules and continuing to the present. Please Identify and produce all Documents that Relate, Mention or Pertain to, or would allow a comparison of or correlation between, Your in-effect retail mobile data prices for LTE usage and Your in-effect wholesale data roaming prices for LTE Roaming.

Objection:

AT&T objects to this request because phrases like "Your in-effect retail mobile data prices" and "Your in-effect wholesale data roaming prices" are vague and ambiguous. AT&T also objects because this request is overbroad, unduly burdensome, and neither relevant to the material facts in dispute in this proceeding nor necessary to the resolution of the dispute.

As discussed in more detail throughout AT&T's submission, including in the Legal Analysis and Declaration of Jonathan Orszag, a comparison of AT&T's proposed rates for data roaming and its retail rates for data usage is not relevant to the disposition of the matters at issue. *See* Meadors Decl. ¶¶ 50-51; Orszag Decl. ¶¶ 78-82. Indeed, the Commission has expressly rejected the use of retail rates as a "benchmark" for evaluating the reasonableness of data roaming arrangements. *See* Legal Analysis § I. Consequently, AT&T objects to providing any information in response to this interrogatory.

To the extent WCX insists this is a relevant comparison, however, AT&T notes that its retail rates for data usage are publicly available. As for AT&T's roaming rates, as explained in various parts of its submission, the rates that AT&T has offered to WCX are lower than the average rate AT&T pays for roaming. *See e.g.*, Meadors Decl. ¶¶ 47-48; Orszag Decl. ¶ 52. In addition, significant detail regarding the rates that AT&T charges and pays for roaming are also set forth in its submission. *See, e.g.*, Orszag Decl. ¶¶ 48-53, 78-82, Ex. B.

Interrogatory No. 5:

This Interrogatory is date-limited: beginning with the effective date of the FCC's *Data Roaming Order* rules and continuing to the present. Please Identify and produce all Documents that Relate, Mention or Pertain to, or would allow a comparison of or correlation between, Your in-effect charges assessed to MVNOs for LTE data usage and Your in-effect wholesale data roaming prices for LTE Roaming.

Objection:

AT&T objects to this request because phrases like "Your in-effect charges assessed to MVNOs for LTE data usage" and "Your in-effect wholesale data roaming prices" are vague and ambiguous. AT&T also objects because this request is overbroad, unduly burdensome, and neither relevant to the material facts in dispute in this proceeding nor necessary to the resolution of the dispute.

As discussed in other parts of AT&T's submission, and as is clear from the Commission's *Data Roaming Order*, resale is a distinct arrangement from roaming and roaming is not to be used for such purposes. *See e.g.*, Legal Analysis §§ I, II. Indeed, the Commission has specifically found that the roaming rates can be set at levels designed to prevent providers from piggy-backing on the host provider's network. *See Data Roaming Order* ¶ 21. Consequently, the rates for resale are not relevant to the reasonableness of AT&T's proposed data roaming rates and thus should not be a factor in determining the commercial reasonableness of a roaming agreement. For these additional reasons AT&T objects to providing information in response to this interrogatory.

Interrogatory No. 6:

Describe any and all technical and pricing differences between the services you provide to MVNOs and to MVNO-like partners such as Amazon and the LTE Roaming services you will provide to WCX. Please Identify and produce all Documents that Relate, Mention or Pertain to, or would allow a comparison of or correlation between, Your in-effect MVNO and MVNO-like arrangements and Your proposed LTE Roaming terms, conditions and prices in this proceeding.

Objection:

AT&T objects to this request because phrases like "Your in-effect MVNO and MVNO-like arrangements" are vague and ambiguous. AT&T also objects because this request is overbroad, unduly burdensome, and neither relevant to the material facts in dispute in this proceeding nor necessary to the resolution of the dispute.

As discussed above and elsewhere in AT&T's submission, MVNO and resale agreements are not relevant to the commercial reasonableness of data roaming arrangements. *See* Resp. to Interrogatories 1 and 5, *supra*; *see also* Legal Analysis §§ I, II. Because WCX has requested data roaming service from AT&T and it is the commercial reasonableness of that proposed arrangement that is at issue in this proceeding, AT&T again objects to providing information regarding resale.

Interrogatory No. 7:

Please direct your attention to the term "reside" as it appears in Sections 11 (a), (b), and (d) of AT&T's proffered agreement.

Please provide a full and complete definition of the term "reside" and Describe how residency will be determined for purposes of 11(a) [WCX's "base of end-user customers"], 11(b) [WCX "retail, wholesale or other wireless services to customers or devices"], and 11(d) AT&T ["providing Wireless Services over Carrier's Network to end-users"].

Objection:

AT&T objects to this request because it is vague, ambiguous, and hypothetical, and because the answer depends on information that AT&T does not have. WCX has claimed that it is currently providing service to customers but has provided no documentary evidence to support that claim and no information about its customer base. Notwithstanding that objection, AT&T is willing to provide an answer to the best of its ability.

Interrogatory No. 8:

Provide a full and complete comparison and contrast between AT&T's definition of "roaming" and AT&T's definition of "resale." To the extent that any given activity is characterized as "resale" rather than "roaming" based on the application of some volumetric scale or progression please Identify the precise point or volume at which "roaming" becomes "resale."

Objection:

AT&T agrees that the distinction between resale and roaming is an important issue in this proceeding. AT&T further believes that the data roaming agreement that WCX has proposed in fact constitutes a backdoor resale arrangement contrary to the Commission's data roaming rules. Recognizing the importance of the distinction, AT&T details its position on resale versus roaming throughout its Answer, Legal Analysis, and supporting declarations. *See*, *e.g.*, Answer at 3-4; Legal Analysis § I, II; Meadors Decl. ¶¶ 37-46; Orszag Decl. ¶¶ 10, 23, 25, 68, 70, 73, 101-106. As a result, AT&T's submission provides a complete response to this request.

AT&T does not agree, however, with WCX's contention that this distinction has a "crucial impact on [its] ability to pursue and exploit substantial existing and emerging opportunities for revenue generation." As detailed elsewhere in its submission, WCX's ability to pursue such opportunities is not reliant on AT&T's definition of resale or roaming or on any of AT&T's proposed terms because WCX is free to do so on its own network or through commercial arrangements with AT&T or other network providers that are not contrary to the Commission's rules. *See* Prise Decl. ¶¶ 1-2, 6-16; Orszag Decl. ¶¶ 7, 10, 12-18, 42, 46, 62, 89, 114**;** *see also* Legal Analysis, Background § E.

Interrogatory No. 9:

Assume Your proposed terms go into effect. Assume further that WCX forms a provider-customer relationship with an Interconnected Text Provider that allows use of the native SMS application programming interface (API) on WCX customers' devices so WCX's users that employ the application can send text messages via WCX's service and network. Assume further that WCX's customer is roaming on AT&T's LTE network and sends a text using the Interconnected Text Provider's application. Would WCX be in breach of Section 11(b) ("neither Party shall permit any other entity to resell the roaming services provided by the Serving Carrier.")?

Objection:

AT&T objects to this request because it is hypothetical and because even as a hypothetical it is vague and ambiguous. For example, the interrogatory is not sufficiently clear with respect to what is meant by a "provider-customer relationship with an Interconnected Text Provider" and a "text using the Interconnected Text Provider's application" for AT&T to answer this question. Further, AT&T objects to providing a response because hypotheticals, as a general matter, are inappropriate for interrogatories, which are intended to provide for the discovery of pertinent *facts*.

Dated: November 5, 2014

Respectfully submitted,

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TAB 11

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 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	)	

AT&T MOBILITY LLC'S FIRST SET OF INTERROGATORIES

Pursuant to Section 1.729 of the Federal Communication Commission's (the "Commission") Rules, 47 C.F.R. § 1.729, AT&T Mobility LLC ("AT&T") requests that the Commission direct Worldcall Interconnect, Inc. a/k/a Evolve Broadband ("WCX"), to respond to the following interrogatories in accordance with the Definitions and Instructions set out below.

DEFINITIONS

The definitions set forth below shall apply to each of the following interrogatories, unless other explicitly indicated:

1. "Any" means each, every, and all persons, places, or things to which the term refers.

2. "Communication" means any transfer of information, whether written, printed, electronic, oral, pictorial, or otherwise transmitted by any means or manner whatsoever.

3. "Copy" means any reproduction, in whole or in part, of an original document and includes, but is not limited to, non-identical copies made from copies.

4. “Describe” and “description” means to set forth fully, in detail, and unambiguously each and every fact of which you have knowledge related to answering the interrogatory.

5. “Document” means any written, drawn, recorded, transcribed, filed, or graphic matter, including scientific or researchers’ notebooks, raw data, calculations, information stored in computers, computer programs, surveys, tests and their results, however produced or reproduced. With respect to any document that is not exactly identical to another document for any reason, including but not limited to marginal notations, deletions, or redrafts, or rewrites, separate documents should be provided.

6. “Identify,” “identity,” or “identification,” when used in relation to “person” or “persons,” means to state the full name and present or last known address of such person or persons and, if a natural person, his or her present or last known job title, the name and address of his or her present or last known employer, and the nature of the relationship or association of such person to you.

7. “Identify,” “identity,” or “identification,” when used in relation to “document” or “documents,” means to state the date, subject matter, name(s) of person(s) that wrote, signed, initialed, dictated, or otherwise participated in the creation of same, the name(s) of the addressee(s) (if any), and the name(s) and address(es) (if any) of each person or persons who have possession, custody, or control of said document or documents.

8. “Identify” when used in relation to a “communication” means to identify the participants in each communication and, if such communication is not contained in a document, the date, place, and content of such communication.

9. “Including” means including but not limited to.

10. “Original” means the first archetypal document produced, that is, the document itself, not a copy.

11. “Person” or “persons” means any natural person or persons, group of natural persons acting as individuals, group of natural persons acting as a group (*e.g.*, as a board of directors, a committee, *etc*.), or any firm, corporate entity, partnership, association, joint venture, business, enterprise, cooperative, municipality, commission, or governmental body or agency.

12. “Relate to,” “relating to,” or “in relation to” means involving, reflecting, identifying, stating, referring to, evidencing, constituting, analyzing, underlying, commenting upon, mentioning, or connected with, in any way, the subject matter of the request.

13. “You,” “your,” or “WCX” means Worldcall Interconnect, Inc.; any of its parent, affiliated or subsidiary companies; and employees, officers, directors, agents, representatives, and all other persons or entities acting or purporting to act on their behalf, including without limitation any outside consultant or witness retained by them. In that regard, each and every interrogatory contained herein is directed at you.

INSTRUCTIONS

When responding to the following interrogatories, please comply with the instructions below:

1. Each interrogatory is continuing in nature and requires supplemental responses as soon as new, different or further information is obtained that is related to answering the interrogatory.

2. Provide all information, including all documents, related to answering the interrogatory that are in your possession, custody, or control, regardless of whether such documents are possessed directly by you or by your employees, officers, directors, agents, representatives, or any other person or entity acting or purporting to act on their behalf.

3. In any interrogatory, the present tense shall be read to include the past tense, and the past tense shall be read to include the present tense.

4. In any interrogatory, the singular shall be read to include the plural, and the plural shall be read to include the singular.

5. In any interrogatory, the use of the conjunctive shall be read to include the disjunctive, and the use of the disjunctive shall be read to include the conjunctive.

6. Any document withheld from production on the grounds of a privilege is to be specifically identified by author(s), addressee(s), length, and date, with a brief description of the subject matter or nature of the document, and a statement of the privilege asserted.

7. Please begin the response to each request on a separate page.

8. Please restate each interrogatory before providing the response or objection.

9. Please specify the interrogatory in response to which any document, narrative response, or objection is provided. If a document, narrative response or objection relates to more than one request, please cross reference.

10. For each separate interrogatory, identify the person(s) under whose supervision the response was prepared.

11. For any interrogatory consisting of separate subparts or portions, a complete response is required to each subpart as if the subpart or portion were propounded separately.

12. Produce any documents in the form of legible, complete and true copies of the original documents as "original" is defined herein.

13. Please provide all documents in their native format, together with all metadata.

14. If you assert that documents or information related to answering an interrogatory are unavailable or have been discarded or destroyed, state when and explain in detail why any such document or information was unavailable, discarded or destroyed, and identify the person directing the discarding or destruction. If a claim is made that the discarding or destruction occurred pursuant to a discarding or destruction program, identify and produce the criteria, policy or procedures under which such program was undertaken.

15. If any interrogatory cannot be answered in full after reasonable inquiry, provide the response to the extent available, state why the interrogatory cannot be answered in full,

and provide any information within your knowledge concerning the description, existence, availability, and custody of any unanswered portions.

INTERROGATORIES

ATT-WCX 1:

Identify all communications WCX has had with network providers other than AT&T regarding roaming, including but not limited to, communications regarding roaming rates, terms and conditions for roaming, or technical aspects of roaming.

Explanation:

WCX claims to have "expended a large percent of its resources pursuing Commercially Reasonable Roaming" not only with AT&T but also with the "industry at large." Feldman Decl. ¶ 29 (Compl. at 53). AT&T seeks more information regarding these efforts particularly with respect to WCX's communications with other providers. This information is relevant to WCX's claim, which AT&T disputes, that AT&T is its only viable roaming partner. The Commission has also identified the presence of alternative roaming partners as a factor to be considered in assessing the commercial reasonableness of a proposed roaming agreement. Further, it is relevant to the assessment of commercial reasonableness to compare the offers exchanged between WCX and AT&T to roaming offers that were communicated between WCX and other providers.

This information is not available to AT&T through a source other than WCX. It is known by WCX and not the type of information that is typically made available publicly.

ATT-WCX 2:

Identify each device that WCX currently offers or plans to offer, including the manufacturer and model of the device, all the bands it can utilize, and the number of paying customers that currently use WCX's service with that device.

Explanation:

WCX has claimed that "AT&T is the only potential roaming supplier that is currently technically compatible with WCX" and that "it is essential that [WCX] establish a roaming arrangement with AT&T Mobility." Am. Compl. ¶¶ 22-23. WCX also alleges that AT&T's proposal violates not only the Commission's "commercially reasonable" standard but also "jeopardize[s] WCX's ability to invest in further deployment of broadband, in violation of §1302." *Id.* ¶ 41.E. AT&T disputes these claims in part on the basis that AT&T is not in fact WCX's only option for data roaming. AT&T seeks information regarding the devices that WCX offers and the bands that those devices can utilize in order to show that there is no technological constraint on WCX partnering with another network provider for roaming services.

AT&T has used what publicly available information it could find to assess WCX's claim regarding technological compatibility but only WCX can confirm what devices it currently offers and plans to offer.

ATT-WCX 3:

Describe the different service plans offered by WCX, including for each plan, the terms and conditions, the types of service included (*e.g.*, data, voice, SMS), all rates and charges for each included service, and the number of paying customers currently on the plan.

Explanation:

WCX proposes a data roaming rate tied to the "current prevailing retail rate" and contends that this rate is commercially reasonable. *See* Am. Compl. ¶ 64. WCX asserts that the "current prevailing retail rate" is $0.0096/MB or approximately $10/GB based on the estimated industry average. *Id.* AT&T disagrees that the data roaming rate should be tied to any retail rate but further believes that the rate WCX claims to be the "current prevailing retail rate" is based on a faulty estimate. The information requested is evidence of whether the estimate is in fact faulty.

Although some of this information may be available publicly, only WCX can confirm the details of the rate packages it offers.

ATT-WCX 4:

WCX claims that it "currently provides 'interconnected' voice and data and text-messaging." WCX Legal Analysis (Compl. at 270). Describe the "interconnected" services WCX currently offers, or plans to offer, including the technical details of how each service is provided, and descriptions of any apps, software or hardware a customer must have to use the service.

Explanation:

WCX asserts that because it "offers interconnected voice and data and text-messaging … AT&T is required to provide 'automatic roaming' 'on reasonable and not unreasonably discriminatory terms and conditions, pursuant to Sections 201 and 202 of the Communications Act.'" WCX Legal Analysis (Compl. at 269-70). AT&T is seeking information about the services WCX claims are "interconnected," including the technological details of how WCX provides those services, because it is AT&T's position that Sections 201 and 202 do not apply to any traffic that WCX provides as data packets.

This information is not available to AT&T through a source other than WCX. It is known by WCX and not the type of information that is typically made available publicly.

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ATT-WCX 5:

Mr. Feldman claims that "WCX has held numerous discussions with potential industry partners about creating joint innovations and launching new innovative services using LTE in the so called 'Machine to Machine' market as well as using LTE in the medical monitoring and LTE in the smart-grid markets." Declaration of Lowell Feldman ¶ 25. Please identify the communications WCX has had with these potential industry partners, the proposed new innovative services that were discussed, the device that would be used for the service, and describe any WCX business models or plans regarding the growing role of M2M/Internet of Things services and applications. *See also* Am. Compl. ¶ 85.

Explanation:

WCX alleges that AT&T's proposed terms and conditions for roaming are commercially unreasonable because they prevent WCX from partnering with developing technology providers and generally from participating in the M2M/Internet of Things market. *See, e.g.*, Am. Compl. ¶¶ 27-28, 52-53, 82, 86-87. WCX further claims that AT&T's proposed terms and conditions will adversely impact its business prospects but provides no details regarding its business plans or the specific impacts that AT&T's proposed terms and conditions might have. Without the information requested by this interrogatory, AT&T cannot assess the merits of WCX's claims in this regard.

This information is not available to AT&T through a source other than WCX. It is known by WCX and not the type of information that is typically made available publicly.

ATT-WCX 6:

Identify WCX's current subscriber base, including retail residential, retail commercial, wholesale and M2M/Internet of Things accounts, specifying the number of subscribers that reside inside and outside of WCX's home service area and the total monthly data usage for each group (residents and non-residents) within each subscriber category (*i.e.*, retail residential, retail commercial, wholesale, and M2M/Internet of Things). For purposes of this request, a subscriber resides inside WCX's home service area only if it has a domicile or place of business within that area.

Explanation:

WCX has claimed that it is providing service to customers but has not presented any specific information regarding the number of its subscribers or anything about them or the services they are utilizing. AT&T seeks more information about WCX's existing subscribers and their usage because it is necessary to understand the type of roaming service WCX requests from AT&T and whether it constitutes impermissible backdoor resale. Further, WCX has claimed that AT&T's proposal is unreasonable because it jeopardizes WCX's continued viability, but WCX has not demonstrated that its business is viable even now.

This information is not available to AT&T through a source other than WCX. It is known by WCX and not the type of information that is typically made available publicly.

ATT-WCX 7:

Describe WCX's build out of its licensed home service area to data and its plan to continue to build out its licensed home service area in the future. The description should include at least a list of the cell sites that WCX has installed and those it plans to install, identifying for each cell cite the location in latitude/longitude, the date it began or is expected to begin operations, the date it began or is expected to begin providing retail services to customers, the equipment that is or will be deployed at the site, and the population and geographic area that is or will be covered by it; and a list of the expenditures that WCX has made on the build out and those it plans to make, identifying for each expenditure the date when it was made or is expected to be made, and the purpose (*e.g.*, spectrum purchases, towers and related equipment, backhaul) for which it was or will be made.

Explanation:

WCX claims that it has invested in its licensed home service area, has met the FCC's build out requirements, and will continue to invest in the area. Am. Compl. ¶ 78. According to WCX, as a result, the rates and terms and conditions of roaming that should be available to it need not be based on the Commission's "investment incentive" principle." *Id.* ¶¶ 48-49. WCX argues that "[u]sage limitations cannot be justified on the basis of some notion that they are necessary to incent further home area investment." *Id*. ¶ 79. WCX further states that the "Commission has expressly recognized that when a provider is self-providing in the home area, then 'roaming' cannot be equated to 'resale.'" *Id*. ¶ 57. AT&T requires additional information about WCX's past and planned investment in building out its home service area because WCX

claims that as a result of such investment the Commission's factors for assessing commercial reasonableness do not apply.

This information cannot be obtained from any other source because it is known only to WCX, or only WCX can identify where the information is available from a public source.

ATT-WCX 8:

Identify the basis, including source data, spreadsheets and other documents, for the Rural Wireless Association's ("RWA") calculation of the "current prevailing retail rate of $0.0096 per megabyte (MB) , or approximately $10 per gigabyte (GB)" and specify whether this rate is calculated based on AT&T's retail rates, industry retail rates, or both. *See* Am. Compl. ¶ 64.

Explanation:

WCX proposes that RWA's calculated "prevailing retail rate" be approved by the Commission "as presumably commercially reasonable in this proceeding and be applied as the Data Roaming Rate in this proceeding." Feldman Decl. ¶ 35 (Compl. at 55). Despite the fact that Mr. Feldman claims a "detailed analysis" of the "prevailing retail rate" is provided in the Declaration of Martyn Roetter, *id.* ¶ 33, AT&T has not been able to determine how the rate of $0.0096/MB was calculated or from what data it was derived. The basis for the proposed rate is relevant to the assessment of its commercial reasonableness.

AT&T has not been able to ascertain this information from another source and believes that WCX will have this information given its involvement with the development of the RWA's proposed roaming agreement.

ATT-WCX 9:

Identify any roaming services that are currently being provided or that have been provided in the past pursuant to the rates and/or terms and conditions set forth in the RWA's proposed roaming agreement.

Explanation:

WCX claims that the RWA's proposed roaming agreement is commercially reasonable. AT&T seeks information about whether the RWA's proposal has been adopted by other providers because the best evidence of reasonableness are the rates and terms that have been negotiated at arm's length in the commercial marketplace.

This information is not the type that is typically available publicly and AT&T believes that WCX will have this information given its involvement with the RWA and the development of the RWA proposed agreement.

ATT-WCX 10:

Identify the "filings in several major Dockets including WT 05-265 (Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers)" at the FCC to which Martyn Roetter has contributed. *See* Roetter Public Decl. (Compl. at 159, ll. 10-13).

Explanation:

WCX hired Mr. Roetter to assess whether the proposals made by WCX and AT&T are commercially reasonable and adhere to the FCC's roaming rules. What he has said in other FCC dockets is relevant to his qualifications to opine on these matters and to whether he has maintained a consistent opinion on them.

Although the filings to which Mr. Roetter has contributed may be available publicly in some or all instances, AT&T must rely on WCX to identify which filings those are.

*** * ***

Dated: November 5, 2014

Respectfully submitted,

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TAB 12

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2014, I caused the foregoing Answer to Amended Complaint and accompanying documents to be served on Complainant and provided to the Commission as indicated below.

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Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
Via Hand Delivery – a complete paper original and one paper copy of the Public Version, a complete paper original and three paper copies of the Confidential/Highly Confidential Version, and one copy of the Confidential/Highly Confidential Version from which the Highly Confidential information has been redacted, i.e. the Confidential Version

W. Scott McCollough
Matthew A. Henry
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Via Electronic Mail and Overnight Mail – a complete copy of the Public, Confidential and Highly Confidential versions

Lisa Saks
Lisa Boehley
Markets Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
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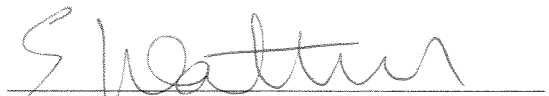

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