

**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)	

RESPONSIVE BRIEF OF AT&T MOBILITY LLC

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AT&T Mobility LLC (“AT&T”) submits this Responsive Brief to the Initial Merits Brief filed by Worldcall Interconnect, Inc. (“WCX”), on August 10, 2015 (the “WCX Brief”), in this proceeding before the Federal Communications Commission (the “Commission”).

I. INTRODUCTION

AT&T has fully complied with its obligations under the Commission’s data roaming rules.¹ Dating back to WCX’s initial request for a data roaming agreement in 2012, AT&T has consistently offered roaming services to WCX at rates and terms that were comparable to, and, in many cases, more favorable than, the rates and terms set forth in AT&T’s existing arm’s length agreements with other mobile wireless providers. This is particularly true of AT&T’s Best and Final Offer (“BAFO”), which includes rates that are well below the average effective rates that AT&T itself pays to other wireless providers for data roaming, and that other wireless providers pay to roam on AT&T’s network. The usage and enforcement provisions in AT&T’s BAFO are also more favorable to WCX than similar provisions in many of AT&T’s roaming agreements with other mobile wireless providers.

By contrast, WCX’s BAFO is not commercially reasonable, and certain of its terms, most prominently its scope provisions, are inconsistent with the Commission’s roaming rules. WCX’s newly minted claim that AT&T should be required to provide roaming to WCX customers even if they do not obtain service from WCX’s facilities-based mobile wireless network is unprecedented and at odds with the Commission’s roaming regulations, which make clear that the roaming rules cannot be used as a backdoor way to obtain *de facto* resale or to create a virtual reseller network. While WCX has abandoned its request for sub-penny per MB roaming rates, its proposed rates nonetheless remain significantly below the average effective rates that other

¹ As explained in greater detail below, the Commission’s voice roaming rules have no application to AT&T’s provision of LTE roaming (which is exclusively a data service). In all events, AT&T has complied with the Commission’s voice roaming rules to the extent those rules are applicable.

wireless providers are paying to roam on AT&T's network. Likewise, WCX's proposed usage restrictions are not consistent with established precedent, and its proposed enforcement provisions would deprive AT&T of the ability to effectively address clear violations of the roaming agreement and expose AT&T to unlimited liability if WCX were in some way dissatisfied with AT&T's performance.

In sum, WCX's claims should be denied because WCX has failed to demonstrate that AT&T's BAFO does not comply with the Commission's roaming regulations.²

II. STANDARD AND BURDEN OF PROOF

The legal standard governing the provision of LTE data roaming service to WCX is the "commercial reasonableness" standard in Section 20.12(e) of the Commission's rules.³ Under that standard, the issue before the Commission is whether AT&T's final data roaming proposal reflects "commercially reasonable terms and conditions."⁴ As to that issue, "the standard of commercial reasonableness" is intended "to accommodate a variety of terms and conditions in data roaming" and "allows host providers to control the terms and conditions of proffered data roaming agreements, within a general requirement of commercial reasonableness."⁵ As such, WCX, as the complainant, bears the burden of showing that AT&T's proposed terms are not

² The remainder of this brief is organized as follows: Section II addresses the applicable standard and burden of proof arguments discussed at pages 3 to 9 of the WCX Brief; Section III discusses the overall reasonableness of AT&T's and WCX's BAFOs as well as WCX's reliance on a roaming agreement it recently executed with another wireless provider; and Section IV responds to WCX's arguments regarding (i) the scope of the roaming obligation; (ii) the parties' proposed usage restrictions; (iii) the parties' respective rate proposals; and (iv) the parties' proposed enforcement provisions.

³ See Legal Analysis in Support of AT&T's Answer ("AT&T Legal Analysis") at 41-43 (Nov. 5, 2014).

⁴ 47 C.F.R. § 20.12(e)(1).

⁵ *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, ¶ 33, 81 (2011) ("Data Roaming Order"); see *id.* ¶ 21 ("we adopt a general requirement of commercial reasonableness for all roaming terms and conditions, including rates, rather than a more prescriptive regulation of rates"); *id.* ¶ 78 ("the duty to offer data roaming arrangements on commercially reasonable terms and conditions will allow greater flexibility and variation in terms and conditions").

commercially reasonable.⁶ If, as here, AT&T’s proposal falls within the range of commercially reasonable rates and terms, then it complies with the Commission’s regulations.⁷ That is, if AT&T’s proposal falls within the range of “commercially reasonable” terms, then AT&T is not obligated to accept WCX’s proposal, even if it too were commercially reasonable.⁸

To circumvent these requirements, WCX argues that the Commission’s voice or “automatic roaming” rules are applicable, that the matters at issue in this proceeding are governed by the just and reasonable standard under Section 201 and 202 of the Communications Act, and that, therefore, WCX’s proposed terms should be presumed to be reasonable.⁹ WCX further suggests that the Commission employ pick-and-choose rules “similar to Rule 51.807(d)(1)” that would allow the Commission to prescribe the terms of a data roaming agreement for the parties.¹⁰ These arguments should be rejected.

First, as AT&T has previously shown, the automatic roaming rules do not apply to the LTE data roaming services that WCX seeks from AT&T.¹¹ The automatic roaming rules 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.”¹² Here, WCX has admitted that (1) “AT&T will not perform many of the same functions it has historically undertaken with regular roaming voice calls or text messages,” (2)

⁶ WCX Brief at 3 (acknowledging that, if the data roaming rules apply, “WCX, as complainant, will have the burden of proving that AT&T’s proposals are not ‘commercially reasonable’”).

⁷ See AT&T Legal Analysis at 15-16.

⁸ *Id.* at 21-22.

⁹ See WCX Brief at 3-5.

¹⁰ *Id.* at 1.

¹¹ See AT&T Legal Analysis 41-43.

¹² 47 C.F.R. § 20.12(a)(2); see *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817, ¶ 54 (2007) (“*Automatic Roaming Order*”); *id.* ¶ 56 (declining to impose automatic roaming obligation on “non-interconnected features of a competitors’ network”).

“to AT&T the communications will look like non-interconnected communications,” and (3) “[t]o AT&T it will be no different than when WCX’s customer is surfing the web or receiving an e-mail.”¹³ Consequently, in providing the roaming services that WCX has requested, AT&T would not be offering a “data service that is interconnected to the public switched network.” By their terms, the automatic roaming rules therefore do not apply.¹⁴ Regardless of what services WCX might be offering to its own customers, AT&T would be providing only non-interconnected data roaming to WCX, and therefore the data roaming rules, not the automatic roaming rules, apply.¹⁵

Second, WCX argues that the Commission should adopt the “issue-by-issue final offer arbitration” standards reflected in the Commission’s rules addressing arbitration under Section 252 of the Communications Act.¹⁶ The pick-and-choose rules reflected in Section 51.807(a) “apply only to instances in which the Commission assumes jurisdiction under Section 252(e)(5) of the Act.”¹⁷ Further, WCX’s argument that the Commission should pick-and-choose contract terms on an issue-by-issue basis is contrary to the *Data Roaming Order*, which explains that “the duty to offer data roaming arrangements on commercially reasonable terms and conditions will

¹³ WCX Legal Analysis (Second Amended Compl. at 271-72). WCX made the same point, that its usage would involve only data, during the course of its negotiations with [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[END HIGHLY CONFIDENTIAL]

¹⁴ 47 C.F.R. § 20.12(a)(2). The Commission recently reaffirmed in the *Net Neutrality Order*, that such data service is governed by the Commission’s data roaming rules, not by Title II, regardless of how the requesting provider elects to utilize that service. *See Protecting and Promoting the Internet*, GN Docket No. 14-28, ¶ 526 (2015) (“We therefore forebear from application of the [commercial mobile radio service] roaming rule, section 20.12(d), to [mobile broadband internet access service] providers, conditioned on such providers continuing to be subject to . . . the data roaming rule codified in section 20.12(e)”). WCX concedes that the *Net Neutrality Order* does not support application of Title II requirements to the data roaming at issue here. WCX Brief at 2 n.4. Finally, even if the Commission were to conclude that Title II standards applied to this case, AT&T’s BAFO satisfies those standards as well. AT&T Legal Analysis at 43 n.239. Indeed, AT&T’s agreements addressing voice and text roaming have never been challenged as being unjust or unreasonable. *Cf. Meadors Decl.* ¶ 51

¹⁵ AT&T Legal Analysis at 6, 41-43.

¹⁶ *See* WCX Brief at 1.

¹⁷ 47 C.F.R. § 51.807(a).

allow greater flexibility and variation in terms and conditions,”¹⁸ and will be evaluated “*based on the totality of the circumstances.*”¹⁹ Indeed, the Commission has made clear that its adoption of “a general requirement of commercial reasonableness for all roaming terms and conditions” is inconsistent with “a more specific prescriptive regulation of rates requested by some carriers.”²⁰

Finally, there is no merit to WCX’s claim that its proposal—which WCX admits is an “amalgam” or “mosaic” cobbled together from various AT&T agreements—should be presumed to be reasonable.²¹ WCX’s proposal for data roaming is not presumed to be reasonable under Section 20.12 of the Commission’s rules. Further, none of the AT&T agreements from which WCX has selectively extracted the terms included in its BAFO contains all of the terms that WCX requests be presumed to be reasonable, nor can WCX point to any existing agreement that contains the array of rates and terms that it has proposed.²² As the Supreme Court has explained, individual service terms, including rates, “do not exist in isolation” but “have meaning only when one knows the services to which they are attached.”²³ As discussed below, AT&T’s BAFO closely tracks the material terms from dozens of existing data roaming agreements.

III. AT&T’S BEST AND FINAL OFFER COMPLIES WITH THE COMMISSION’S ROAMING RULES

A. AT&T’s Best and Final Offer

WCX has not met its burden of proving that AT&T’s BAFO is not commercially reasonable, nor can it. The rates, terms and conditions of AT&T’s BAFO are fully consistent

¹⁸ *Data Roaming Order* ¶ 78.

¹⁹ *Id.* ¶ 86 (emphasis added).

²⁰ *Id.* ¶ 21.

²¹ WCX Brief at 6.

²² *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 29 FCC Rcd. 15483, ¶¶ 25-26 & n.70 (2014) (“*WTB Declaratory Ruling*”) (presumption of reasonableness extends only “to the terms of the existing agreement, and the parties that signed it”).

²³ *American Telephone & Telegraph Co. v. Central Office Telephone*, 524 U.S. 214, 223 (1997).

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL] In addition, both the dispute resolution provisions (which have been agreed to in principal)³¹ and the suspension and termination provisions are fully consistent with AT&T's other roaming agreements.³²

Finally, the fact that AT&T's BAFO does not in all instances constitute the best rate or term that AT&T may have made available in agreements with other providers is not a basis for concern. The Commission's data roaming rules make clear that providers have leeway to determine what rates and terms to offer so long as those rates and terms are within a zone of reasonableness.³³ Further, in many instances, the "better" terms that WCX seeks were extracted from strategic agreements whose rates and terms address a broader set of rights and, as such, are not representative of the rates and terms applicable to an arm's length data roaming agreement.³⁴

B. WCX's Best and Final Offer

Having abandoned its advocacy of the Rural Wireless Association's ("RWA's") model roaming agreement, WCX now argues that the Commission should adopt an agreement produced by WCX's counsel's selective incorporation of favorable provisions from AT&T's various agreements with other wireless providers. To this collection of terms, WCX then adds a new set of definitions intended to expand the scope of AT&T's roaming obligation to include not only WCX customers that take mobile service in WCX's facilities-based licensed mobile wireless service area, but also customers that take service anywhere that WCX [BEGIN

²⁹ Meadors Supp. Decl. ¶ 7.

³⁰ See AT&T BAFO at § 11(c).

³¹ Meadors Supp. Decl. at Exh. B (Comparison of AT&T and WCX BAFOs) at § 25.

³² See Meadors Decl. ¶¶ 57-59.

³³ See AT&T Legal Analysis at 2; see *supra* at 2-3 & nn. 3-8.

³⁴ Meadors Supp. Decl. ¶¶ 16-18; Orszag Supp. Decl. ¶¶ 51-54.

CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL]

As explained in greater detail in Section IV.A, this expansion of the scope of AT&T's proposed roaming obligation is not consistent with the Commission's data roaming rules, nor is it commercially reasonable. Further, the definitions on which WCX relies do not appear in *any* data roaming agreements but were plucked from Commission data requests in other contexts. As a consequence, WCX's proposed agreement is not representative of *any* other agreement in the marketplace; instead, it is an out-of-context "amalgam" of terms favorable to WCX.

The specific terms and conditions offered by WCX are also not commercially reasonable. *First*, the rates that WCX has proposed are based on AT&T's strategic agreements, which are an inappropriate benchmark, and the proposed rates are more favorable than any AT&T has offered on an arm's length basis to any other wireless providers. *Second*, WCX's proposed [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] is well above the total usage restriction that AT&T generally includes in new agreements, and even that "limit" is misleading because WCX proposes to calculate total usage on the basis of its expanded definition of the scope of AT&T's alleged roaming obligation.³⁶ Moreover, taken together, WCX is proposing that it be permitted to roam more freely on AT&T's network than is standard

³⁵ WCX BAFO at § 1 ("Carrier's Service Area"). WCX has invented this service area definition to facilitate its current business plan; it finds no support in any other roaming agreement, including the RWA model agreement, WCX's agreement [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL], and certainly not in AT&T's dozens of data roaming agreements with other providers.

³⁶ WCX argues that the "numeric cap of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] falls comfortably within [the] range" of "numeric limits" agreed to by AT&T. WCX Brief 15, 28. Here, too, WCX has cherry-picked AT&T's data. In fact, most of AT&T's agreements include numeric caps well below the [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] cap proposed by WCX. Orszag Supp. Decl., Tbl. B-3.

and also to do so at a lower rate than any of AT&T's other arm's length roaming partners. That is not commercially reasonable.

Finally, WCX's proposed enforcement provisions are imbalanced and not commercially reasonable. Under the terms proposed by WCX, there is no mechanism for AT&T to [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL]

WCX has shown no justification for these one-sided terms, which are not commercially reasonable.

C. WCX's Highly Confidential Roaming Agreement with Another Wireless Provider

In an effort to bolster its position, WCX points to a roaming agreement that it recently negotiated with another wireless provider. WCX argues that its agreement [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] is the only truly market-based roaming agreement in evidence.³⁷ Therefore, it contends, that the [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] is a "better indicator" of what is commercially reasonable than any of AT&T's dozens of agreements.³⁸

³⁷ WCX Brief at 7. There is no merit to WCX's claim that AT&T's roaming agreements are "adhesion contracts" and therefore not reflective of market conditions. *See id.* WCX asserts that AT&T's contracts are not market-based because they "are entirely imbalanced and were not entered under anything close to equal bargaining positions." *Id.* WCX provides no evidentiary support for these claims, nor can it. AT&T currently has roaming agreements with dozens of other mobile wireless service providers, many with less favorable terms than those offered to WCX, and none of these providers has brought a complaint challenging the terms of its agreement with AT&T.

³⁸ *Id.*

As an initial matter, the existence of this agreement wholly undermines the claim set forth in WCX’s initial complaint that it had no alternatives other than AT&T for roaming and from a technical standpoint it could only roam on AT&T’s network.³⁹ As AT&T has previously demonstrated, WCX has multiple options to roam on the networks of other wireless providers – a fact confirmed both by its new agreement with [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]

Second, the existence of this [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] does not support WCX’s position that AT&T’s BAFO is not commercially reasonable. [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

³⁹ See, e.g., Second Amended Compl. at 4; Declaration of Lowell Feldman (Oct. 1, 2014) at ¶ 5 (“Feldman Decl.”).

⁴⁰ See WCX Response to Interrogatory ATT-WCX 1 and referenced documents. Likewise, there is no merit to WCX’s claims regarding the availability of multi-antenna handsets. Indeed, WCX has admitted that its access to such devices is greater than it originally claimed. See WCX Response to Interrogatory ATT-WCX 2.

⁴¹ WCX Brief at 22 (arguing that only AT&T and Verizon “can provide close to fully nationwide roaming”).

⁴² See also Section IV.C, *infra*.

⁴³ WCX Brief at 9-13.

[END HIGHLY CONFIDENTIAL]

IV. MAJOR ISSUES IN DISPUTE

The BAFOs submitted by AT&T and WCX reflect four principal areas of dispute regarding the Commission’s data roaming regulations. Those areas are: (a) the scope of data roaming under the Commission’s rules, (b) commercially reasonable restrictions on data roaming usage, (c) the range of commercially reasonable rates for data roaming services, and (d) the mechanism for enforcing the terms of the agreement. In each instance, AT&T has proposed commercially reasonable terms and conditions under the Commission’s rules.

A. Scope of Data Roaming Obligation.

WCX argues that “AT&T and WCX fundamentally disagree over what is ‘roaming’ and what is ‘resale.’”⁴⁸ Specifically, WCX asserts that (1) any roaming agreement must “have an express Commission-imposed definition” of “roaming,”⁴⁹ and (2) AT&T’s BAFO is commercially unreasonable because it denies “roaming to WCX customers that reside anywhere other than WCX’s fully-licensed 700 MHz CMA.”⁵⁰ Neither argument has merit.

WCX’s criticism that AT&T’s BAFO does not include a definition of roaming is baseless. While AT&T’s BAFO (like most other roaming agreements⁵¹) does not expressly define the term roaming, it includes two provisions that directly address the scope of the roaming

[REDACTED] [END HIGHLY CONFIDENTIAL]

⁴⁸ WCX Brief at 9.

⁴⁹ *Id.* at 9-13 (arguing for definition of “roaming”).

⁵⁰ *Id.* at 18; *see id.* at 18-22 (arguing that WCX should be permitted to use roaming to market its services outside its “700 MHz ‘licensed’ area”)

⁵¹ [BEGIN HIGHLY CONFIDENTIAL]

[REDACTED] [END HIGHLY CONFIDENTIAL]

obligation. Specifically, AT&T's BAFO defines "Roamer" as [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL]

WCX acknowledges that these terms, taken together, mean that "AT&T's BAFO terms deny roaming to WCX customers that reside anywhere other than WCX's fully-licensed 700 MHz CMA."⁵⁴ As such, there is no ambiguity regarding the permissible scope of its data roaming obligation under AT&T's BAFO.

There is also no merit to WCX's claim that AT&T's obligation to provide data roaming services under the Commission's rules should be extended to include WCX customers that take service from networks other than WCX's facilities-based mobile wireless network.⁵⁵ WCX cites no precedent for such a rule, nor does such precedent exist. To the contrary, the Commission's data roaming regulations provide that "[a] facilities-based provider of commercial mobile data services is required to offer roaming arrangements to *other such providers*"—*i.e.*, other "facilities-based provider[s] of commercial mobile data services."⁵⁶ As such, the regulation imposes "an obligation ... on *facilities-based providers of commercial mobile data services* to offer data roaming arrangements to *other facilities-based providers of commercial mobile data*

⁵² AT&T BAFO at § 1.

⁵³ *Id.*

⁵⁴ WCX Brief at 18 ("AT&T criticizes WCX's desire to market facilities-based services to users residing outside of WCX's fully licensed home area").

⁵⁵ *See id.*

⁵⁶ 47 C.F.R. § 20.12(e) (emphasis added).

services.”⁵⁷ WCX is a “facilities-based provider of commercial mobile data service” with respect to customers [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL]

Consequently, AT&T’s obligation to provide data roaming services extends only to customers of WCX that take service on WCX’s mobile wireless facilities-based network, and the definitions in AT&T’s BAFO that mandate that result are taken directly from the Commission’s regulations and follow the Commission’s core understanding of “roaming.”⁵⁹

WCX’s assertion that the data roaming obligation should be extended to create broad virtual networks is contrary to the Commission’s rules.⁶⁰ As the Commission has made clear, the data roaming obligation was imposed to facilitate customers’ ability to obtain service when they were using their mobile device outside their home service area and thereby to insure that regional providers could compete for customers in their facilities-based network service area:

Providers with local or regional service areas need roaming arrangements to offer nationwide coverage For example, Cincinnati Bell represents that “[d]ue to the limited availability of nationwide roaming partners for 3G and 4G services, [i]t is seeing a steady defection of its customers to the national carriers even though Cincinnati Bell offers a superior network *in its operating area.*”⁶¹

⁵⁷ *Data Roaming Order* ¶ 67.

⁵⁸ AT&T BAFO at § 1.

⁵⁹ Compare AT&T BAFO at § 1 with 47 C.F.R. § 20.12(e). Compliance with the Commission’s data roaming rules is not an “unreasonable contractual restraint of trade.” WCX Brief at 19. Third parties have explained to WCX that [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[END HIGHLY CONFIDENTIAL]

⁶⁰ Any request to expand the existing rules – rather than enforce those rules – should be brought through a declaratory ruling. 47 C.F.R. § 1.2; *Data Roaming Order* ¶ 82. WCX seeks a ruling that “will be precedential and vital for both parties and the entire wireless industry.” WCX Br. 2. The declaratory ruling process is better suited to clarify rules for the “industry” as it allows “comment on the petition via public notice.” 47 C.F.R. § 1.2(b).

⁶¹ *Data Roaming Order* ¶ 15 (emphasis added).

The data roaming obligation was not intended to enable mobile wireless service providers to extend their existing service areas by piggy-backing on the networks of other providers without making the required investments in their own facilities-based mobile wireless networks.⁶²

Similarly misplaced is WCX's discussion of the differences between "roaming" and "resale."⁶³ The distinction between "roaming" and "resale" is not explained by the "technical" argument that WCX sets forth regarding SIM Cards and network carrier codes.⁶⁴ Rather, the Commission has explained that "CMRS resale entails a reseller's purchase of CMRS service provided by a facilities-based CMRS carrier in order to provide resold service within the same geographic market as the facilities-based CMRS provider."⁶⁵ In fact, the Commission rejected a "technical" definition of "resale" when it explained that the data roaming rules could not be used "as a backdoor way to create *de facto* mandatory resale obligations."⁶⁶ Accordingly, the difference between "roaming" and "resale" is as follows: Data roaming is a narrow mandatory obligation imposed to allow facilities-based mobile carriers to compete for customers within their service areas,⁶⁷ whereas "resale" and "backdoor resale" include efforts by wireless providers to expand their customer base to include customers that reside outside of their

⁶² *Id.* ¶ 88 (explaining that roaming obligations cannot "be used as a backdoor way to create *de facto* mandatory resale obligations or virtual reseller networks."). WCX is wrong when it argues that expansion of the data roaming obligation to encompass resale to customers outside its "fully licensed service area" would somehow "limit its reliance on AT&T." WCX Brief at 18. The claim that WCX seeks to ease AT&T's burden, *id.* at 19, is based on a fundamental misunderstanding of the scope of AT&T's obligation to provide roaming services.

⁶³ See WCX Brief at 11-13.

⁶⁴ The Commission's definition of resale, see WCX Brief at 12, does not turn on which SIM card is used by the ultimate customer. Indeed, Google's Project Fi is a resale arrangement in which customers receive a Project Fi SIM card that allows them to access to the T-Mobile or Sprint networks. See Ben Popper, *What the hell is an MVO, and why is Google building one with Fi?*, The Verge, (April 22, 2015), available at <http://www.theverge.com/2015/4/22/8471243/google-project-fi-mvno-sprint-t-mobile>.

⁶⁵ *Automatic Roaming Order* ¶ 51 ("the Commission's mandatory resale rule was sunset in 2002, and automatic roaming obligations can not be used as a backdoor way to create *de facto* mandatory resale obligations or virtual resale networks"); *Data Roaming Order* ¶ 88 (quoting same).

⁶⁶ *Id.* ¶ 88; see *id.* ¶ 41 n.122 ("roaming arrangements cannot be used as a backdoor way to create *de facto* mandatory resale obligations"); *id.* ¶ 34 ("the data roaming obligation does not create mandatory resale obligations").

⁶⁷ *Id.* ¶ 15 ("Providers with local or regional service areas need roaming arrangements to offer nationwide coverage").

facilities-based service area and are connected to the provider's facilities-based network by some other means, most commonly a resale agreement.

[BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]

a wireless provider can as a matter of contract agree to expand the scope of services provided under its "roaming" agreement beyond the requirements imposed by the Commission.⁶⁹ Indeed, that is exactly what occurs in the case of permanent roaming, which no provider is required to provide under the data roaming regulations.

B. AT&T's Usage Restrictions are Commercially Reasonable.

WCX argues that its "proposed caps and volumetric limits strike the right balance" between "incent[ing] facilities investment as much as possible" and "recognize[ing] that very few providers will be able to entirely cover huge swaths of country with their own facilities and rural users will routinely travel out of the coverage area for long periods."⁷⁰ After describing the parties competing proposals, WCX contends that "[s]taff should pick one of the parties' numbers or select something in between."⁷¹ WCX fundamentally misunderstands the nature of the Commission's data roaming rules.

⁶⁸ See WCX Brief at 6 & n.11 ("treating third party supplied radio access as WCX network").

⁶⁹ For the same reason, "Google's 'Project Fi'" and other similar projects provide no support for WCX's claim. None of those projects is based on a roaming agreement. See WCX Brief at 8. Those projects are based on resale agreements with the underlying carriers – a path that is open to WCX to pursue, but that is not mandated under the data roaming rules. See 47 C.F.R. § 20.12(b)(3) (sunset provision for mandatory resale obligation); *Automatic Roaming Order* ¶ 51 ("Commission's mandatory resale rule was sunset in 2002").

⁷⁰ WCX Brief at 13-14.

⁷¹ *Id.* at 15.

The relevant question is not which of the parties' proposals is more reasonable, but whether AT&T's proposed terms and conditions fall within a range of "commercially reasonable" terms. In this regard, the Commission expressly has rejected "more specific prescriptive regulation" in favor of a "commercial reasonableness" standard that grants providers of data roaming service "appropriate discretion" with regard to "all roaming terms and conditions, including rates."⁷² Indeed, the Commission has noted that "the duty to offer data roaming arrangements on commercially reasonable terms and conditions will allow greater flexibility and variation in terms and conditions, as parties will negotiate their rights and obligations under the agreements."⁷³ In turn, the D.C. Circuit upheld the "commercially reasonable" standard against a facial challenge precisely because the Commission "built into the 'commercially reasonable standard considerable flexibility for providers to respond to the competitive forces at play in the mobile-data market,'"⁷⁴ and because the "commercially reasonable" standard "largely leaves the terms of [the] agreement up for negotiation."⁷⁵ As a result, it would be inappropriate for the Commission to prescribe different usage terms if AT&T's proposal is within the range of "commercially reasonable" terms.

Moreover, doing so here would be particularly inappropriate because AT&T's proposed limitations on roaming are unquestionably "commercially reasonable" in the data roaming marketplace.⁷⁶ As explained by Mr. Meadors, as "compared to the standard usage provisions in many of AT&T's data roaming agreements, the usage provisions in AT&T's Proposed

⁷² *Data Roaming Order* ¶ 21.

⁷³ *Id.* ¶ 78.

⁷⁴ *Cellco P'ship v. FCC*, 700 F.3d 534, at 548 (D.C. Cir. 2012) (explaining that the "'commercially reasonable' standard, at least as defined by the Commission, ensures providers more freedom from agency intervention than the 'just and reasonable' standard applicable to common carriers").

⁷⁵ *Id.*

⁷⁶ *See* Orszag Supp. Decl. ¶¶ 27-30.

Agreement provide WCX with greater access to AT&T's network for purposes of roaming.”⁷⁷

Specifically, AT&T's proposed limitation on total usage has been [BEGIN CONFIDENTIAL]

[REDACTED]

[END CONFIDENTIAL] Likewise, AT&T's proposed restriction on permanent roaming

[BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL] As explained by Mr. Orszag, “[t]he usage restrictions AT&T has proposed to WCX are consistent with agreements executed between AT&T and other wireless service providers.”⁸¹ The “commercial reasonableness” standard requires nothing more.

Further, and in all events, WCX ignores a fundamental problem with its own proposed limit on roaming usage. Specifically, WCX proposal provides:

[BEGIN CONFIDENTIAL] [REDACTED]

[END CONFIDENTIAL]

Under this proposal, WCX calculates the roaming percentage by comparing the traffic volume generated on AT&T's mobile network not against [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

⁷⁷ Meadors Supp. Decl. ¶ 6.

⁷⁸ *Id.* (citing AT&T BAFO § 11(a)).

⁷⁹ *Id.* (citing AT&T BAFO §§ 11(b), 13).

⁸⁰ *Id.* ¶ 7 (citing AT&T BAFO §§ 11(c), 25).

⁸¹ Orszag Supp. Decl. ¶ 27.

⁸² WCX BAFO at § 11(b)(1); *see also id.*, § 11(b)(2) [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL]

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

C. AT&T's Proposed Rates are Commercially Reasonable.

WCX argues that AT&T's "price is extortionate and entirely without cost justification" and that "AT&T's roaming price is higher than retail prices, and exceeds resale prices by even greater amounts."⁸⁴ According to WCX, "[t]he 'right' price" is "comparable to or somewhat below retail [rates]," and that a "price that exceeds retail" would "make it impossible for WCX to compete at the retail level no matter how efficient or innovative it is in the operation of its own facilities and services."⁸⁵ WCX's arguments lack merit and should be rejected.

First, WCX ignores the Commission's standards for "commercially reasonable" rates for data roaming.⁸⁶ The Commission expects that roaming rates will be "much higher than retail rates,"⁸⁷ so as to "counterbalance the incentive" to "rely[] on another provider's network."⁸⁸ More recently, the Wireless Bureau provided further "guidance," noting that it would *not* preclude evidence that "proffered roaming rates are *substantially in excess of retail rates, international rates, and MVNO/resale rates.*"⁸⁹ In so ruling, the Commission once again

⁸³ Orszag Supp. Decl. ¶¶ 56-57 (explaining that "the manner in which WCX proposes to calculate the total traffic volume of its end-users . . . differs significantly from the way in which such volumes are calculated under the usage provisions in AT&T's agreement with other wireless providers").

⁸⁴ WCX Brief at 22. Imposition of a cost-based regulation would be contrary to the *Data Roaming Order*, and, in all events, could not be imposed in an enforcement proceeding. *Cf.* 47 C.F.R. § 1.2.

⁸⁵ WCX Brief at 23.

⁸⁶ AT&T Legal Analysis at 24-25 & nn.138-141 (addressing Commission's statements regarding relationship between retail and roaming rates).

⁸⁷ *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); *see also Automatic Roaming Order* ¶¶ 37-40.

⁸⁸ *Data Roaming Order* ¶ 51.

⁸⁹ *WTB Declaratory Order* ¶ 9 (emphasis added).

confirmed that “retail rates” and “resale rates” “do not function as a ceiling or cap on prices.”⁹⁰ These determinations foreclose WCX’s position that roaming rates may not “exceed[]” and should be “comparable to or somewhat below retail [rates].”⁹¹ As explained by Mr. Orszag, AT&T’s proposed rates are commercially reasonable under the *Declaratory Ruling* as they are not substantially in excess of AT&T’s retail, international or resale rates.⁹²

Second, WCX further ignores that AT&T’s proposed rates [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] are commercially reasonable because they are well below the average effective rates paid by AT&T for data roaming and by other wireless providers to roam on AT&T’s network in arm’s length agreements entered into in the domestic data roaming marketplace.⁹³ As AT&T previously explained, these rates are particularly probative because AT&T has historically been a net purchaser of data roaming service.⁹⁴ Indeed, “the rates offered to WCX are [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

⁹⁰ *Id.* ¶ 18.

⁹¹ WCX Brief at 23.

⁹² *See* Orszag Supp. Decl. ¶¶ 31-48. Mr. Orszag provides detailed data explaining that AT&T’s offer to WCX is not substantially in excess of AT&T’s retail rates. *Id.* ¶ 43 & Table B-5, or AT&T’s international roaming rates, *id.* ¶ 45 & Tbl. B-6, and is not comparable to AT&T’s resale rates, *id.* ¶¶ 46-48. Dr. Roetter’s supplemental declaration does not dispute these values or suggest that these other rates undermine AT&T’s proposal. Instead, he backtracks by arguing that AT&T’s retail rates, international rates and resale rates for data roaming do not provide appropriate guidance under the circumstances. Roetter Supp. Decl. at 17, ¶ 11 (arguing that AT&T’s “retail rates” include charges that should not apply to “the use of AT&T’s network by roamers”); *id.* at 18, ¶ 12 (arguing that circumstances surrounding certain international roaming agreements are “not remotely comparable to that faced by a small US operator”); *id.* (arguing that the rates paid in AT&T’s resale agreements “are irrelevant to WCX’s situation”). Dr. Roetter also criticizes Mr. Orszag’s calculation of AT&T’s effective retail rates for taking into account line access charges and other payments that retail customers must make claiming that they are not relevant despite the fact that they are part of the overall retail price. This is another example of WCX’s cherry-picking and is also directly contradictory to the methodology advanced by Dr. Farrell in the T-Mobile declaratory ruling proceeding, testimony which WCX relied on in its complaint. *See e.g.* Second Amended Complaint at 7.

⁹³ Meadors Supp. Decl. ¶ 5; Orszag Supp. Decl. ¶¶ 24-26.

⁹⁴ Meadors Decl. ¶ 9.

⁹⁵ Orszag Supp. Decl. ¶ 26.

Third, WCX does not seek to justify its rates on these marketplace factors but instead argues for rate regulation based on the provider’s cost and WCX’s claimed ability to compete.⁹⁶ Nowhere in the Commission’s rulings is such an approach endorsed, nor would such an approach be consistent with the Commission’s desire for light-touch regulation grounded in market principles.⁹⁷ Indeed, the Commission adopted a general requirement of “commercial reasonableness for all roaming terms and conditions, including rates, rather than a more specific prescriptive regulation of rates.”⁹⁸ Under that approach, the Commission expected that “the relatively high price of roaming compared to providing facilities-based service” would limit efforts by one carrier to piggy-back on another carrier’s network.⁹⁹ The D.C. Circuit likewise explained that (i) “the data roaming rule leaves substantial room for individualized bargaining and discrimination in terms,”¹⁰⁰ and (ii) “the Commission has thus built into the ‘commercially reasonable’ standard considerable flexibility for providers to respond to competitive forces at play in the mobile-data market.”¹⁰¹ WCX’s argument that the Commission should prescribe “[t]he ‘right’ price” violates these settled legal standards.¹⁰²

Fourth, WCX’s reliance on rates plucked from AT&T’s strategic agreements is particularly inappropriate.¹⁰³ As explained in the supplemental declarations of Mr. Meadors and Mr. Orszag, those agreements involve much more than data roaming,¹⁰⁴ and include “other

⁹⁶ WCX Brief at 22-23 (arguing that AT&T’s proposed rates are “without cost justification”).

⁹⁷ AT&T Legal Analysis at 19-20.

⁹⁸ *Data Roaming Order* ¶ 21.

⁹⁹ *Id.*; see also *id.* ¶ 51 (same).

¹⁰⁰ *Cellco*, 700 F.3d at 548.

¹⁰¹ *Id.*

¹⁰² *Id.* (explaining that the data roaming rules require providers “to come to the table and offer a roaming agreement where technically feasible” and “the ‘commercially reasonable’ standard *largely leaves the terms of that agreement up for negotiation*”) (emphasis added).

¹⁰³ WCX Brief at 24.

¹⁰⁴ See Orszag Supp. Decl. ¶¶ 51-54; Meadors Supp. Decl. ¶¶ 16-19.

economic terms not directly related to roaming that affect the negotiated roaming rates.”¹⁰⁵ Such agreements involve [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL] As a consequence, the rates on which WCX relies are not limited to roaming and hence “are not representative of the rates that would be negotiated in connection with an agreement that only involved roaming.”¹⁰⁷ In this regard, WCX simply ignores that some strategic agreements contain rates significantly *higher* than the rates paid just for roaming, which further confirms that they are not reliable indicators of the rates for purely data roaming service.¹⁰⁸

Finally, the rates reflected in WCX’s recent agreement [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] are irrelevant.¹⁰⁹ Most significantly, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

¹⁰⁵ Orszag Decl. ¶ 52.

¹⁰⁶ Meadors Supp. Decl. ¶ 17 & Exhibit C thereto (summarizing strategic agreements).

¹⁰⁷ *Id.* ¶ 18; Orszag Supp. Decl. ¶ 53 (“[R]oaming rates in strategic agreements are inherently distorted by other components of the agreement and are not a good predictor of the rates that would result in an arm’s length agreement between independent parties just for roaming”).

¹⁰⁸ Dr. Roetter’s criticism of Mr. Orszag’s exclusion of the strategic agreements from his analysis, (*see* Roetter Supp. Decl. at 13), is not soundly based. For example, Dr. Roetter suggests that the distinction between strategic and arm’s length roaming agreements is arbitrary because AT&T did not categorize the [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] agreement as strategic. Roetter Supp. Decl. at 13. That observation is inaccurate. In fact, Mr. Orszag and Mr. Meadors treated that agreement as strategic for precisely the reasons that Dr. Roetter identified. *See* Orszag Supp. Decl. at Table B-4; Meadors Supp. Decl. at Exhibit C [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]. Likewise, Dr. Roetter’s argument that AT&T’s elimination of the strategic agreements is tipping the scales in AT&T’s favor because the strategic agreements “include prices that are far more favorable ... than those proposed to WCX,” (Roetter Supp. Decl. at 12), ignores that [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL] *See* Orszag Supp. Decl. at Table B-4.

¹⁰⁹ WCX Brief at 24.

CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL]

In its brief, WCX does not raise any specific concerns with respect to the enforcement terms that AT&T has proposed, and Mr. Feldman, in fact, notes that they are similar to what WCX has offered.¹¹⁷ WCX does, however, insist that certain additional terms be added to protect it from the possibility that AT&T might breach the agreement. In support of these provisions, WCX asserts that “AT&T is hostile to roaming” and has “an incentive to frustrate full implementation” of any roaming agreement reached.¹¹⁸

There is no basis in the record to support these claims. AT&T has dozens of roaming agreement with other mobile wireless providers, and there is no evidence that it has failed to live up to its obligations. Further, the provisions that WCX proposes to add would completely undermine AT&T’s ability to enforce its agreement even in the face of a clear violation. Under WCX’s BAFO, [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]

¹¹⁶ AT&T BAFO at §§ 19, 22; Meadors Decl. at 26-27.

¹¹⁷ See WCX Brief at 24-25; Feldman Supp. Decl. at 21.

¹¹⁸ WCX Brief at 24-25.

¹¹⁹ WCX BAFO at § 19(d). This is in stark contrast to the suspension and termination rights WCX has built into its retail agreements. Under the general terms applicable to WCX’s retail customers, WCX “can, without notice, suspend or terminate any [s]ervice at any time for any reason.” See Evolve Broadband, General Terms and Conditions Applicable to all Customer Contracts at P 30 (Tab 3 of WCX production at 769). Further, under the agreement WCX entered with [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL].

[REDACTED]

[REDACTED] [END CONFIDENTIAL] These provisions are purportedly based on a concern that AT&T might refuse to perform its obligations under the agreement. Yet, WCX cannot point to a single instance where any counterparty to any AT&T roaming agreement has made such an allegation. Moreover, it is simply not fair to limit AT&T's ability to enforce the agreement, but at the same time expose AT&T to unlimited liability.

V. CONCLUSION

For the reasons set forth, above as well as in its prior submissions in this proceeding, AT&T submits that WCX has not shown a violation of Commission Rule 20.12(e), and thus WCX's claims should be denied and its complaint should be dismissed.

¹²⁰ WCX BAFO at §§ 19, 22, 26. Again, this is in contrast with WCX's agreement with its customers, which provides that WCX shall not be liable for any consequential damages. Evolve Broadband, General Terms and Conditions Applicable to all Customer Contracts at P 44 (Tab 3 of WCX production at 775).

Dated: August 31, 2015

AT&T SERVICES, INC.

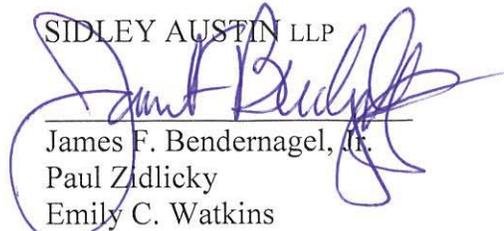
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