

PUBLIC VERSION

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)	
)	
WORLDCALL INTERCONNECT, INC.)	File No. EB-14-MD-011
a/k/a EVOLVE BROADBAND)	
Complainant)	
)	
v.)	
)	Proceeding No. 14-221
AT&T MOBILITY LLC)	
Defendant)	

REPLY BRIEF OF WORLDCALL INTERCONNECT, INC.

Matthew A. Henry
henry@dotlaw.biz
W. Scott McCollough
wsmc@dotlaw.biz
MCCOLLOUGH|HENRY PC
1250 S. Capital of Texas Hwy Bldg 2-235
West Lake Hills, TX 78746

Counsel for Complainant

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I. Introduction

The statute and the Commission's policies emphasize technological neutrality that adapts to rapid changes in commercial mobile technology and the commercial mobile ecosystem. The Commission wants to encourage innovation, investment, build-out and deployment of advanced services, and achieve the most efficient use of spectrum. The Commission abhors barriers to infrastructure investment, innovation or competition through new entry. True mobility requires seamless, nationwide interconnection and interoperation, without any discrimination based on the technology that is used to provide service. Market power must be constrained where it is being abused to block or impede facilities-based competition.

Worldcall Interconnect, Inc. ("WCX") has entered the nationwide market as a facilities-based mobile service carrier that uses GSMA member standards. WCX embraces the Commission's above-stated policies and is deploying technology like Project Fi¹ and M2M products using WCX's core network in ways that are spectrally efficient, seamless, technologically neutral and interoperable. WCX will operate Radio Access Networks ("RAN") using several different types of spectrum because there is not enough available fully-licensed spectrum. WCX is the primary facilities-based service provider, but WCX still, of course, needs roaming. WCX has another roaming partner² and another agreement is in the works.³ But WCX must have AT&T roaming for about 20% of the population and 15% of the land area.⁴

AT&T is abusing its market power, preventing entry and frustrating the Commission's

¹ AT&T Br. p. 15 and n. 64 mischaracterizes the significance of Project Fi, which is important because it uses seamless interoperability and handoff between licensed and unlicensed spectrum capabilities that AT&T itself intends to implement using different technology. WCX will use similar technology, but the SIM will use WCX's Mobile Network Code ("MNC"), not one from a wholesaler like Sprint or T-Mobile.

² WCX has an executed roaming agreement with [REDACTED] (hereinafter "carrier X").

³ See WCX Interrog. Resps., Tab 2, Bates pp. 502-759.

⁴ AT&T Br. p. 23 (quoting *Data Roaming Order*).

goals and policies. AT&T's Best and Final Offer ("BAFO") has draconian restraint of trade provisions that prohibit roaming if WCX uses alternative or third-party spectrum (including other carriers' roaming) and denies roaming if WCX markets or sells service outside of CMA 667. AT&T requires non-compliance with the Commission's policies as a condition of roaming with AT&T and its price is prohibitively expensive. WCX therefore brought this complaint to obtain reasonable and sustainable roaming terms consistent with the Commission's stated policies.

II. This Complaint involves the automatic roaming rule *and* the data roaming rule.

WCX seeks roaming terms from AT&T to support WCX's interconnected voice and data services *and* WCX's commercial mobile data services. WCX's interconnected texting, voice and data services fall under 20.12(a)(2) and (d). WCX's commercial mobile data service falls under 20.12(e). The *Data Roaming Order* encourages consolidated complaints,⁵ so WCX filed this Complaint under the automatic roaming rule *and* the data roaming rule.⁶

AT&T says WCX's complaint involves only data roaming and WCX cannot invoke the automatic roaming rule.⁷ That is why AT&T did not bother to make a case that its terms are just and reasonable as required by 20.12(d), or rebut the presumption of reasonableness WCX's automatic roaming request has under 20.12(d). AT&T effectively concedes that, if the automatic roaming rule applies, AT&T's terms cannot be used.

AT&T claims that *AT&T* will not be providing interconnected service *to WCX or WCX's*

⁵ See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 2nd R&O, 26 FCC Rcd 5411, ¶75 (2011) ("*Data Roaming Order*") ("[S]ome roaming disputes will involve both data and voice and are likely to have factual issues common to both types of roaming. The approach we are taking allows, but does not require, a party to bring a single proceeding to address such a dispute, rather than having to bifurcate the matter and initiate two separate proceedings under two different sets of procedures. This, in turn, will be more efficient for the parties involved, as well as for the Commission, and should result in faster resolution of such disputes.").

⁶ WCX Second Amended Complaint ¶¶21, 41B, 41D, 94(b).

⁷ AT&T Br. pp. 3-4.

users, so 20.12(a)(2) and (d) do not apply.⁸ This argument conflates the activity that gives rise to a roaming duty, and the activity that fulfills that duty. The 20.12(a)(2) and (d) obligation to host automatic roaming is invoked when a carrier provides interconnected services *to the public*,⁹ which AT&T indisputably does over its 2G, 3G and LTE RANs.¹⁰ The carrier must then host other competitive carriers so they can provide their own facilities-based interconnected services via the host carrier's RAN. The automatic roaming rule does not turn on whether the host carrier is providing "interconnected service" to the other carrier or the other carrier's own users.¹¹

AT&T then says WCX waived its right to automatic roaming rule by stating that the parties' networks will communicate via data packets.¹² WCX did explain that AT&T's network will receive traffic from WCX in IP format, but that is not an admission that there would be no interconnected service traffic. It is a simple observation that all interconnected services, including AT&T's own VoLTE, now use IP, which employs data packets. WCX seeks access to AT&T's RAN precisely so WCX can provide interconnected services when WCX's customers are roaming. Some of that traffic will be for WCX's interconnected *data* service, to which 20.12(a)(2) expressly applies. The automatic roaming rule does not go away merely because the host carrier sends the information to the retail provider using data packets.

⁸ AT&T Br. p. 4 ("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."). If accepted, this theory would also mean that AT&T is not obligated to provide a "roaming arrangement for commercial mobile data service" to WCX because such service would not be "commercial mobile data service" under Rule 20.3, given that it is not "available to the public."

⁹ 47 C.F.R. § 20.12(a)(2) and (d) (Compare application of rule to "CMRS carriers" versus "host carriers." *See also In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, R&O and FNPRM, 22 FCC Rcd. 15817 (2007) ¶ 29 ("*Automatic Roaming Order*") (The automatic roaming rule applies to "CMRS providers *competing in the mass market* for real-time, two-way voice and data services." (emphasis added)).

¹⁰ WCX Br. p. 5.

¹¹ *Data Roaming Order* ¶¶38, 40, 41 and 42 also refute AT&T's interpretation. Paragraphs 41 and 42 go on to emphasize that the duty applies "without regard to the mobile technology" and "without regard to the devices used to access or receive" services. AT&T also asserts in note 14 that the *Open Internet Order* supports its interpretation. It does not. Paragraphs 525 and 526 belie AT&T's claim that automatic roaming is dead. Reclassification to Title II and finding that retail mobile broadband is "interconnected" renders 20.12(e) inapplicable and 20.12(d) subsumes "data roaming." The Commission forbore this result by *retaining* 20.12(d) and (e), pending a new proceeding.

¹² AT&T Br. pp. 3-4.

III. Issue-by-issue final offer arbitration is well-suited to resolve this Complaint.

The Commission has not prescribed a mandatory process for adjudicating roaming complaints. It instead granted the Enforcement Bureau wide latitude.¹³ WCX recommends an approach similar to issue-by-issue final offer arbitration under Rule 51.807(d).¹⁴ The issue-by-issue process provides a time-tested, well-understood and workable path forward.

AT&T opposes this approach and even claims it would be “contrary to the *Data Roaming Order*[.]” AT&T argues that the Bureau can only find that AT&T’s proposed terms are, in their totality, either commercially reasonable or in violation of the data roaming rule, and cannot prescribe other terms.¹⁵ However, the *Data Roaming Order* expressly contemplates BAFOs from both parties,¹⁶ so a complainant’s BAFO can obviously be considered and imposed.¹⁷ WCX’s suggestion should be accepted.

IV. The AT&T BAFO is not commercially reasonable under Rule 20.12(e) and AT&T has not attempted to demonstrate that it is just and reasonable under Rule 20.12(d).

AT&T completely failed to prove its roaming rates and terms are just and reasonable. AT&T’s BAFO, especially the restraint of trade provisions, is also not commercially reasonable for the limited circumstances when data roaming alone is used.¹⁸ AT&T’s primary defense is that its BAFO is consistent with *some* of its other roaming agreements.¹⁹ But this is a case of first impression and the Commission has never found that AT&T’s terms are commercially reasonable for *any* carrier, much less WCX. Besides, it was AT&T’s conduct and the terms in

¹³ See *Automatic Roaming Order* ¶ 30-31; *Data Roaming Order* ¶ 74-76.

¹⁴ WCX Br. p. 1.

¹⁵ AT&T Br. p. 4-5. Here again, AT&T ignores the automatic roaming rule and the presumption of reasonableness granted to WCX’s request under Rule 20.12(d).

¹⁶ *Data Roaming Order* ¶ 79.

¹⁷ See *Data Roaming Order*, Dissenting Statement of Commissioner Meredith Attwell Baker at note 7 (Commissioner Baker recognized that the Bureau would “impos[e] the terms and conditions of the best and final offer of a party requesting roaming.”).

¹⁸ That will rarely occur. WCX Br. p. 4.

¹⁹ AT&T Br. pp. 5-7. AT&T, however, ignores the fact that the other AT&T roaming agreements do not have all of the sweeping restraint of trade provisions contained in AT&T’s BAFO.

some of these very same agreements that necessitated the roaming rules.²⁰ This complaint process exists because AT&T has consistently failed to voluntarily offer roaming on reasonable terms in the past. Many of the providers that have agreements with AT&T deny they are reasonable, but simply did not have the resources to litigate the question.²¹ WCX *did* file a complaint, and cannot be required to suffer unreasonable terms merely because others chose to accept one-sided contracts of adhesion. The rules exist to *constrain* and *prevent* abuses, not perpetuate them. Consistency with some of AT&T's other agreements does not support a finding of reasonableness for AT&T's BAFO in this case. In fact, it shows the opposite.

V. The AT&T BAFO unreasonably excludes WCX's facilities-based wireless services provided using alternative wireless spectrum.

AT&T's own argument on "scope of data roaming obligation" demonstrates powerfully why AT&T's BAFO is neither just and reasonable nor commercially reasonable. There is indeed "no ambiguity" that "AT&T's BAFO terms deny AT&T roaming to WCX customers that reside anywhere other than WCX's fully-licensed 700 MHz CMA."²² WCX offers facilities-based CMRS service to end users throughout the country using other types of wireless spectrum.²³ WCX secured roaming from other carriers like AT&T demanded, but AT&T now says WCX cannot roam with AT&T because it did so. AT&T's BAFO unreasonably discriminates against facilities-based mobile customers and denies them roaming based on the technology they use when *not* on AT&T's RAN.²⁴ This is arbitrary and unreasonable, violates both roaming rules,

²⁰ *Data Roaming Order* ¶¶ 24-25; *In re Reexamination of Roaming Obligations of Providers*, Order on Recon and 2nd FNPRM, 25 FCC Rcd. 4181, ¶ 26-35 (2010) ("*Automatic Roaming Reconsideration Order*").

²¹ See Roetter Reply Decl., Exhibit 1, Docs. 88-92, attached to WCX Reply to AT&T Answer at Bates pp. 819-902.

²² AT&T Br. p. 13.

²³ Feldman Suppl. Dec. pp. 6, 8, 10, and 22.

²⁴ AT&T Br. pp. 18-19 claims the calculation should exclude all non-AT&T RAN use other than that on WCX's CMA 667 network from the denominator, no matter how substantial, based on AT&T's notion that WCX's services outside CMA 667 are not facilities based mobile service. This would artificially inflate the result and could yield a number greater than the *actual* percent of total usage on AT&T's RAN.

and conflicts with GSMA standards and a host of clearly-articulated Commission policies.²⁵

AT&T argues that *any* WCX mobile service offered outside of its 700 MHz area is *not* a facilities-based service for roaming purposes and AT&T therefore has no duty to provide roaming for those services. AT&T does not even try to explain why these are not facilities-based mobile services.²⁶ AT&T's terms restrict WCX's facilities-based service to the confines of CMA 667, and restrain trade by prohibiting any marketing and roaming outside of its 700 MHz area, even when WCX's *own* facilities will serve those customers. AT&T's roaming restrictions are entry barriers intended to keep WCX out of the nationwide facilities-based CMRS market.²⁷

AT&T's refusal to provide roaming to customers using anything other than like-licensed LTE spectrum²⁸ undermines multiple Commission policies. If accepted, this restriction would interfere with the Commission's goals of fostering efficient use of spectrum and encouraging innovation.²⁹ WCX has accepted the Commission's calls for innovation, competition and efficient uses of spectrum, and—unlike AT&T—has enthusiastically embraced common carriage status, but WCX cannot have a viable competitive service that does not include roaming.³⁰ AT&T's terms violate the roaming rules, are inconsistent with the Commission's policies, and

²⁵ These policies include technological neutrality, adaption to rapid changes, encouragement for innovation, investment, build-out, deployment of advanced services and efficient use of spectrum, seamless, interoperable interconnection and interoperation, and removal of barriers to new entry,

²⁶ *Id.* pp. 13-16. AT&T nonsensically deems the disfavored facilities-based mobile services to be “resale.”

²⁷ AT&T's BAFO and its brief define and apply terms in a manner that is far more restrictive than how the Commission has historically used and applied them. AT&T says that only a fully-licensed geographic parcel can be a “home area” and “roaming” is available only to users that reside in that parcel and are serviced through the licensed spectrum. But the Commission does not agree. The definition of “home market” in 20.3 between 2007 and 2010 spoke to wireless licenses *and* other spectrum usage rights.

²⁸ Under AT&T's BAFO terms, [REDACTED]

²⁹ See *Data Roaming Order* ¶ 41 (The data roaming rule applies “without regard to the mobile technology” used to provide services and “without regard to the devices used to access or receive” services in order to “achieve technological neutrality” and ensure that the rule “is adequate in the face of rapid changes in commercial mobile technology and the commercial mobile ecosystem overall.”); see also ¶ 64 (Mentioning the “goal of encouraging investment and innovation and the efficient use of spectrum.”) These goals are actually tasks assigned to the Commission by Congress. See 47 U.S.C. §§ 157, 257(b), and 1302(a) and (b).

³⁰ WCX Br. pp. 21-22.

cannot be adopted.

VI. The AT&T BAFO roaming rates are unreasonably and prohibitively excessive.

AT&T's third major issue is the roaming rate. AT&T argues that its proposed rate is commercially reasonable because it is consistent with the extremely high rates in some of its other roaming agreements.³¹ AT&T misconstrues the Commission's prior orders to claim that the prices in other agreements control the price in this case.

The Commission has never stated that it intends roaming rates to be much higher than retail as AT&T claims. AT&T quotes from a passage of the 2010 *Automatic Roaming Reconsideration Order* that notes (without judgment) a concern expressed by a petitioner. It is not an actual finding.³² AT&T's recourse to misrepresentation shows that there is no legitimate justification for its excessive rate.

The Commission recently held that roaming rates can and should be judged against retail prices when assessing reasonableness as one of multiple consideration factors.³³ It is particularly relevant in this case because AT&T's rate is so extortionate that WCX cannot both roam and provide a competitively priced service.³⁴ WCX has proposed an initial rate substantially above retail but declining toward the current high-end of retail over a three year period. This price will ensure a reasonable return for AT&T, incent WCX to find alternatives to AT&T roaming, but

³¹ AT&T Br. p. 19. AT&T makes no effort to show that its rates are just and reasonable under Title II.

³² See *Automatic Roaming Reconsideration Order* ¶32 and note 90. Paragraph 32 is actually comparing the "relatively high price of roaming compared to" *the underlying cost* of providing facilities-based service itself. If a carrier's *cost* of owning the network that provides the service is much less than the *price* for roaming on another network then the carrier has incentive to build rather than roam. The gap between owning cost and roaming cost is what "will often be sufficient to counterbalance the incentive to 'piggy back' on another carrier's network." Using retail rate as a benchmark provides that gap and incentives to self-deploy.

³³ See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Declaratory Ruling, 29 FCC Rcd 15483, ¶¶ 9 and 17-18 (2014) ("*WTB Declaratory Ruling*").

³⁴ Roetter Supp. Decl. pp. 14-16.

also not price WCX out of the nationwide CMRS market.³⁵ WCX's rate is consistent with the roaming rules and the underlying policies, while AT&T's rate is not.

VII. The AT&T BAFO enforcement provisions are unreasonably one-sided and would encourage abuse by AT&T.

AT&T argues that its enforcement provisions are commercially reasonable and superior to WCX's proposed terms. However, AT&T's terms are overly one-sided and would invite abuse. WCX's enforcement terms are eminently reasonable and would reduce the likelihood of future disputes, making them far more preferable.

[REDACTED]

[REDACTED] Such one-sided terms are a recipe for abuse. In contrast, WCX's enforcement terms are fair, just and reasonable, and commercially reasonable.

VIII. WCX's other roaming agreement is the best market-based evidence of reasonable terms, conditions and rates for roaming.

WCX successfully negotiated a roaming agreement with Carrier X³⁸ that contains the same rates and essentially the same terms as WCX seeks in this case.³⁹ This agreement shows

³⁵ *Id.* pp. 4 and 15.

³⁷ AT&T Br. p. 25.

³⁸ *See supra* note 2.

³⁹ Feldman Supp. Decl. pp. 22-24. The substantive wording may differ, but the result is quite similar.

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that another major nationwide CMRS carrier agreed that WCX's positions are valid and reasonable. It also demonstrates the type of mutually-beneficial roaming arrangements that flow from host carriers that embrace Commission policies regarding innovation, efficiency and neutrality.

AT&T claims this new contract signifies nothing other than that WCX no longer requires roaming from AT&T,⁴⁰ but AT&T is not relieved of its roaming duties just because WCX has an agreement with another carrier.⁴¹ AT&T then contradictorily argues that the rates Carrier X has agreed to (and which WCX proposes here) would not be reasonable for AT&T because AT&T's network is "superior."⁴² AT&T provides no legal basis for this theory that the roaming rate should increase with network coverage,⁴³ nor does it attempt to explain how a network covering

higher rate when fully implemented.⁴⁵

AT&T also incorrectly argues that the X agreement is substantively different from the terms WCX seeks in this case because it prohibits all permanent roaming. In fact, the Carrier X agreement includes a [REDACTED] allowance for WCX's M2M services where WCX is not the primary provider of service.⁴⁶ AT&T then plucks part of one sentence out of context from hundreds of pages of communications to claim that Carrier X agrees with AT&T that WCX is seeking resale rather

⁴⁰ AT&T Br. p. 10.

⁴¹ Notably, AT&T's Brief did not dispute WCX's observation that, under AT&T's BAFO, any WCX customer that can roam on X's network will be denied Authorized Roamer status on AT&T's network. *See* WCX Br. p. 19. AT&T says there are alternatives but then inserts another restraint of trade by forcing WCX to *only* use AT&T's roaming.

⁴² AT&T Br. pp. 10 and 22-23.

⁴³ Notably, AT&T's other agreements do not adopt this concept that larger networks command higher roaming rates.

⁴⁴ AT&T Br. p. 23.

⁴⁵ Roetter Supp. Decl. p. 16, ¶ 7.

⁴⁶ The agreed definition of "permanent roamer" and "roamer" is also much different and incorporates a meeting of the minds as to what constitutes "Roaming," which is why there is no specific definition of "Roaming."

than roaming.⁴⁷ AT&T forgot to mention that, after further discussion, Carrier X reversed course and agreed that WCX is seeking roaming, not resale,⁴⁸ which is why the parties executed a “Roamer” agreement that allows WCX to provide nationwide service.⁴⁹ Neither WCX nor Carrier X have enough market power to force unreasonable, one-sided roaming terms on other carriers, and the result is a set of mutually-beneficial, market-based terms. This agreement proves that WCX’s BAFO is reasonable and fair, and AT&T’s terms are not.

IX. Conclusion

The roaming rules were promulgated *over AT&T’s objection and because of AT&T’s actions*, so AT&T’s claims are inherently suspect. AT&T wants impermeable economic and regulatory barriers that will block insurgent infrastructure investment and new competitive entry. AT&T is trying to prevent seamless interconnection and interoperation. The Commission’s well-founded policies and rules were promulgated almost entirely because of AT&T’s rapacious disposition. WCX has sought protection and relief under those rules and AT&T cannot now be allowed to wish them away, or interpret them into inconsequence.

WCX is not trying to change the rules.⁵⁰ WCX merely asks that they be *enforced* so WCX can better compete where it is not feasible for WCX to find any alternative to AT&T. AT&T’s BAFO is laden with provisions that gut the Commission’s policies and restrain trade. They would harm competition and consumers, and benefit only AT&T’s own selfish interests. They are neither just and reasonable nor commercially reasonable. The Bureau must reject them and impose WCX’s BAFO.

⁴⁷ AT&T Br. p. 11.

⁴⁸ See WCX Interrog. Resps., Tab 1, Bates pp. 278, 299, 308, 310 (negotiations) and 419 (resolution).

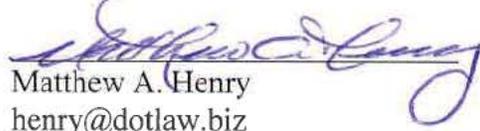
⁴⁹ See WCX Interrog. Resps. Bates p. 817 (emphasis added). Carrier X Agreement Schedule 2 allows nationwide service, and p. 820 definition of Permanent Roamer only includes cases where WCX is not the primary provider.

⁵⁰ *C.f.* AT&T Br. p. 14 and n. 60.

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Respectfully Submitted,

WORLDCALL INTERCONNECT, INC. a/k/a
Evolve Broadband,
by and through counsel:



Matthew A. Henry
henry@dotlaw.biz

W. Scott McCollough
wsmc@dotlaw.biz

MCCOLLOUGH|HENRY PC
1250 S. Capital of Texas Hwy Bldg 2-235
West Lake Hills, TX 78746

Counsel for Complainant

September 14, 2015

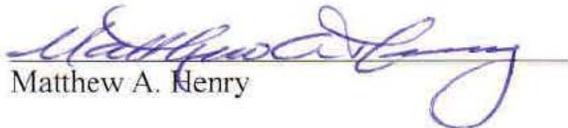
CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2015, I caused a copy of the foregoing to be served on the following as indicated below:

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554
Via Hand Delivery

Lisa Saks
Lisa Boehley
Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554
Via Email and Hand Delivery

James F. Bendernagel, Jr.
David L. Lawson
Paul Zidlicky
Thomas E. Ross.
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
Via Email



Matthew A. Henry