Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers	)	WT Docket No. 05-265
Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services	)	WT Docket No. 00-193

COMMENTS OF METROPCS COMMUNICATIONS, INC.
ON THE *NOTICE OF PROPOSED RULEMAKING*

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SUMMARY OF COMMENTS

MetroPCS Communications, Inc. ("MetroPCS"), a provider of innovative broadband wireless telecommunications services to nearly 2,000,000 subscribers, is commenting on the *Notice of Proposed Rulemaking* in WT Docket No. 05-265 pertaining to the obligations of commercial mobile radio service ("CMRS") operators to provide roaming services.

The MetroPCS comments demonstrate that there have been radical changes in the CMRS marketplace which prevent the Commission from relying upon market forces to foster ubiquitous roaming arrangements:

- FCC-sanctioned mergers of major wireless carriers have created an enormous size disparity between the nationwide carriers and the local and regional carriers which are seeking roaming rights. By allowing the large carriers to consolidate and expand their reach, the Commission has reduced their incentive to enter into reasonable reciprocal roaming agreements.
- Consolidation also has reduced the number of technically-compatible nationwide roaming partners a local or regional carrier can choose. For example, the nationwide CDMA market is now a duopoly, which gives these carriers enormous bargaining power and can lead to unreasonable behavior.
- Barriers to entry in the wireless business have risen dramatically. Shortages of spectrum, difficulties in securing and licensing antenna sites, and the sheer cost of establishing a competitive nationwide system, mean that smaller carriers have no choice but to enter into roaming agreements to provide nationwide service. Again, the result is a complete disparity of bargaining position which is not conducive to fair and equitable agreements.

To cure this problem, the Commission needs to reinforce its prior holding that roaming is a common carrier service, and adopt a strong statement of principles that will ensure that roaming service, both manual and automatic, will be provided in every instance where it is technically feasible. Roaming rates must be cost-based and non-discriminatory. Carriers must be prohibited from providing more favorable roaming arrangements to themselves and to their affiliates than to unaffiliated third parties. Carriers also must be prohibited from providing preferential arrangements to non-facilities-based competitors (*e.g.*, resellers and MVNOs) while refusing to enter into suitable arrangements with facilities-based competitors. And, safeguards must be adopted to enable a requesting carrier to protect its legitimate interests.

The most important safeguard would be to require that roaming agreements be made public so that requesting carriers have the basic information they need to negotiate a fair agreement and to avoid being discriminated against. In addition, carriers should have the right to opt into roaming arrangements on the same terms and conditions, including rates, as are offered to others.

In sum, based upon changed circumstances, the Commission should mandate manual and automatic roaming at non-discriminatory, cost-based rates. To effect this policy, the Commission should exercise its authority under Section 211 of the Communications Act, and make carriers file or otherwise make publicly available their roaming agreements with all other carriers (affiliated and unaffiliated) and with resellers and mobile virtual network operators.

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MetroPCS Communications, Inc. ("MetroPCS"),[1] by its undersigned counsel, respectfully submits its comments on the *Notice of Proposed Rulemaking*, FCC 05-160, released August 31, 2005 (the "*NPRM*")[2] in the above-captioned proceeding. The following is respectfully shown:

I. The Interest of MetroPCS

MetroPCS is a facilities-based telecommunications carrier that provides broadband wireless services to nearly 2,000,000 subscribers in and around the San Francisco, Sacramento, Miami, Tampa, and Atlanta metropolitan areas through personal

[1] For purposes of this Petition, the term "MetroPCS" refers to the parent company (MetroPCS Communications, Inc.) and all of its FCC-licensed subsidiaries.

[2] *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers* (WT Docket No. 05-265); *Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services* (WT Docket No. 00-193), Notice of Proposed Rulemaking, 20 FCC Rcd 15047 (2005).

communications services ("PCS") licenses it holds. MetroPCS is one of the fastest growing wireless service providers in the nation and is in the process of expanding its operations into other major metropolitan areas.[3] MetroPCS offers interconnected commercial mobile radio services ("CMRS") through unique rate plans that feature unlimited calling for a low flat monthly fee. The MetroPCS offerings include a basic plan that features unlimited local calling, and other rate plans which include both unlimited local calling and unlimited long distance in the continental United States along with other enhanced features, such as voicemail, 3-way calling, and text messaging. In addition to its unlimited rate plans, MetroPCS' customers also may purchase services on an *à la carte* basis.

MetroPCS' service is a flexible, low-cost alternative to the plans offered by the large national wireless carriers. MetroPCS is a new entrant which brings competition to existing markets and also is expanding the market for wireless services by attracting new customers to wireless services. MetroPCS estimates that approximately forty percent (40%) of its users are first-time wireless users. Further, because of its pricing approach, the MetroPCS service has become a substitute for landline service for many of its customers. MetroPCS' data indicate that approximately forty percent (40%) of the MetroPCS subscribers use their MetroPCS wireless phone as their primary or exclusive telecommunications service. As a result of the unique services offered by MetroPCS, the

[3] MetroPCS has acquired spectrum rights in Detroit, MI and Dallas, TX. *See* FCC File Nos. 0001967542 and 50000CWAA05. MetroPCS also holds a non-controlling interest in Royal Street Communications, LLC, which was the high bidder in Auction No. 58 for licenses in Los Angeles, CA and Orlando/Jackson, FL, among others. *See* FCC File No. 0002069525.

company's service is enjoying rapid customer acceptance. For example, in Miami, MetroPCS went from having no customers to having the second-largest customer base within three years.

Because of the customers being attracted to MetroPCS' service and the type of services being offered by MetroPCS—namely wireline substitution—MetroPCS customers historically have not demanded that their service include or be capable of roaming outside of their home market area. MetroPCS customers enjoy full wireless mobility within their home market and have used manual roaming to roam outside their home markets. Increasingly, however, MetroPCS customers have begun requesting the ability to automatically roam outside of the MetroPCS footprint. To some extent this reflects MetroPCS' increasing penetration into the business subscriber market segment, the increasing acceptance of nationwide and regional anywhere, anytime rate plans introduced by the national carriers, and the subscribers' desire to have a more robust service which allows them to communicate when they travel outside their home area. In any event, the capability to provide automatic roaming is becoming a requirement for carriers in today's marketplace. As a consequence, MetroPCS has broached the subject of roaming with other technically compatible carriers. As is set forth in greater detail below, MetroPCS has found it to be extremely difficult to reach suitable arrangements at reasonable rates with the major national carriers.

In addition, in recent months the Commission has heard an increasing number of concerns being expressed by other smaller local or regional carriers who also have found it difficult to negotiate reasonable roaming arrangements with the larger, predominantly

national carriers.[4] The current *NPRM* was initiated in part because roaming has emerged as a recurring issue in recent merger transactions and the Commission decided that it was most appropriate to address those concerns in the context of a rulemaking rather than in proceedings dealing with private party transactions. MetroPCS agrees. MetroPCS also believes that roaming, and the issue of whether the market for roaming services is working, deserve urgent attention. The Commission has had a roaming inquiry ongoing for more than a decade.[5] Yet, despite significant changes in the marketplace, the regulatory requirements governing roaming have remained essentially unchanged since the Commission applied the manual roaming requirement to broadband PCS providers in 1996.[6] In the meantime, the wireless market has changed considerably in the last ten years.

In 1996, there were no large national carriers – the only carrier which even came close was AT&T Wireless, and it had substantial gaps in coverage. This fostered a need for voluntary roaming agreements by many in the industry. In addition, analog wireless service was the norm and the rise of digital service was just beginning. Now, with four large national carriers and digital standards which limit roaming possibilities, national carriers no longer need other carriers as much, and correspondingly, the Commission can

[4] *See NPRM*, paras. 10 and 38; *see also Ex Parte* presentation of Cricket Communications, Inc. dated September 16, 2005 in WT Docket No. 00-193 entitled "*The Need for Regulatory Intervention with Respect to Automatic Roaming*."

[5] *See Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Service*s, CC Docket No. 94-54, Second Notice of Proposed Rule Making, 10 FCC Rcd 10666 (1995).

[6] *See Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, Second Report and Order and Third Notice of Proposed Rulemaking, 11 FCC Rcd 9462, 9464 para. 3 (1996) (hereinafter the "Interconnection and Resale Obligations Second Report and Order").

no longer rely solely on the marketplace to ensure that large nationwide carriers to enter into reasonable roaming arrangements with smaller carriers.[7] Put another way, pure market forces no longer are adequate to foster the seamless wireless network that is desirable in light of the Commission's explicit "determination that the availability of roaming on broadband wireless networks [is] important to the development of nationwide, ubiquitous, and competitive wireless voice telecommunications."[8] Accordingly, the Commission must re-examine the regulations surrounding roaming.

II. Changes In the Wireless Market Compel Commission Action

Changes since 1996 now mandate that the Commission require automatic roaming and change the rules surrounding the terms and conditions, including rates, by which such services are offered. One of the most significant changes that has transpired since 1996 is the rise of large national carrier marketing national and regional rate plans, including large "buckets" of minutes with automatic roaming between systems. With the advent of national and regional bucket rate plans, including intercarrier network automation, manual roaming is no longer viable as a means by which smaller and regional carriers can credibly compete in the marketplace. Manual roaming requires the customer for an outbound call to interact with an operator, pay a call set-up fee, and to pay substantial per-minute rate. In-bound calls to customers roaming out of their home service territory may not even be possible. By contrast, the current national and regional

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[7] The problem is not limited to so-called "rural" carriers. *See* discussion *infra* at pp. 21-22.

[8] *NPRM* at para 5*; see also Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9464 para. 2, 9468-70 paras. 10-11.

rate plans of the large nationwide carriers allow customers seamlessly to place (and receive) calls automatically, without operator intervention, for low per-minute rates. Given the competitive advantages enjoyed by the large national carriers, absent Commission involvement, those carriers have no incentives to and thus will not, offer automatic roaming to regional and rural carriers.

The marketplace and technology have changed so dramatically that automatic roaming is now more ubiquitous than manual roaming was in 1996. Access to automatic roaming is essential for the success of regional and smaller carriers in a highly competitive environment. In addition, many of the technical issues which were raised in prior proceedings regarding automatic roaming have been solved. It now is time for the Commission to adjust its rules to ensure that automatic roaming is mandated (wherever technically feasible) just as manual roaming was required in 1996. Just as the Commission has not countenanced dialing disparity for landline calls, the Commission should not now countenance dialing disparity between wireless systems for roaming calls.

Another significant change that has taken place in the broadband wireless service marketplace over the past decade has been the growth, both in terms of breadth of coverage and size, of the large nationwide service providers. This growth accelerated recently as the FCC approved various mega-mergers which have further consolidated the industry and have increased the market power of the leading service providers. MetroPCS does not dispute that these mergers may offer some potentially significant public interest benefits by allowing carriers to enjoy greater economies of scale in a

highly capital-intensive business, but allowing these mergers has reduced the incentive of the merged entities to enter into roaming arrangements with smaller local or regional operators.[9] These mergers have reduced the very interdependencies that the Commission previously relied upon to make sure roaming services were made available at reasonable rares. National carriers no longer need the smaller regional and rural carriers and thus are refusing to enter into roaming agreements.

In a related regulatory context, the Commission has recognized that the incentive for carriers to cooperate to reach mutually acceptable arrangements to pass traffic back and forth can be lost when there is a greater disparity in size between the two entities. In looking at interconnection issues facing the Internet backbone industry, a Commission policy paper correctly observed:

> Internet backbone providers face conflicting incentives. On one hand, they have an incentive to cooperate with one another in order to provide their customers with access to the full range of Internet users and content. On the other hand, these same backbones have an incentive to compete with one another for both retail and wholesale customers. The need for backbone *A* to interconnect with backbone *B* in order to provide its customers access to backbone *B*'s customers creates what might be termed a *competitive network externality*; this interconnection also enables backbone *B* to provide its customers access to backbone *A*'s customers. As long as *A* and *B* are relatively equally sized, there is a strong incentive for them to cooperate with one another in spite of competitive network externalities; if either unilaterally stops interconnecting, it has no guarantees that it will benefit from such an action. This situation seems to characterize the early days of the commercial Internet, when a number of backbones were relatively similar in size, and readily agreed to peer with one

[9] Not only have the mergers lessened the carrier's incentives to enter into roaming agreements, but they have also affected the behavior of potential roaming partners who may be positioning themselves to be acquired in the future. With the industry divided into two digital standards camps, this lessens the roaming and acquisition possibilities to only those carriers using the same digital standard.

> another. Recently, however, there have been allegations that as certain backbones grew they began to engage in uncooperative, if not anti-competitive, practices.[10]

This is precisely the problem that has arisen in the broadband wireless services. By allowing the large carriers to merge and expand their geographic reach, the Commission has reduced their incentive to enter into reciprocal roaming arrangements because the area they gain by entering into a roaming agreement is so much smaller than the area they offer in a reciprocal arrangement. In addition, the mergers have skewed the relative sizes of customer bases between potential roaming parties with the national carriers having in many instances customer bases five to ten times the size of their potential roaming partners.

The disincentive of large carriers to offer roaming to others is exacerbated because the geographic expansion of the large carriers increases the number of instances in which the carrier seeking a roaming arrangement is a direct facilities-based competitor of the proposed roaming partner in some markets. When there is no geographic overlap in competitive systems, both carriers have a strong incentive to enter into a roaming arrangement to extend the geographic scope of both of their coverage areas, perhaps in an effort to better compete with others. When coverage areas partially overlap, the carrier with the larger area has a competitive incentive to deny a roaming arrangement to the other carrier because doing so may improve the carrier's competitive edge in the areas of overlap. At that point, the incentive to compete outweighs the incentive to cooperate. In effect, as a result of the rise of large national carriers who do not need regional and rural

[10] *See* Michael Kende, Office of Plans and Policy, Federal Communications Commission. *The Digital Handshake: Connecting Internet Backbones* at 9 (OPP Working Paper No. 32, Sept. 2000).

carriers, the Commission can no longer rely solely upon market forces and voluntary arrangements to promote ubiquitous roaming, especially when the carriers seeking the roaming arrangements overlap with the large national carriers.

Notably, this is not a problem being experienced only by rural carriers who may still operate in areas not served by the large national carriers.[11] MetroPCS by contrast operates in major metropolitan areas. These are highly competitive markets where MetroPCS is competing head-to-head with every major nationwide carrier which could be a suitable roaming partner in areas outside MetroPCS' service area. These potential roaming partners stand to gain a competitive advantage in the areas where MetroPCS is providing facilities-based competition by denying the MetroPCS customers the ability to roam outside of the home market.

The other difficulty presented by the FCC-approved mergers is the significant reduction in the number of potential roaming partners, particularly when technical system differences are taken into consideration. In both the Cingular Wireless/AT&T Wireless merger and the ALLTEL Corporation/Western Wireless Corporation merger, the Commission heard claims that, in many markets, smaller carriers were facing a two-to-one reduction in the number of potential roaming partners considering that such arrangements can only be made with a carrier operating a technically compatible

[11] The *NPRM* refers to concerns by "small and rural carriers" but does not define these terms. The point MetroPCS is making is that a carrier can become relatively large, and provide service in certain major metropolitan areas, and still have a significant problem in dealing with another carrier with a nationwide footprint.

network.[12] This reduction means that the merged carrier enjoys considerable bargaining power in any roaming negotiations and may have little incentive to negotiate with carriers that overlap acquired markets. The result can be either outright denial of roaming or price gouging, meaning that roaming services, if made available, are not offered on reasonable terms and conditions, including rates.[13] The Commission cannot have it both ways—touting the competitive benefits of consolidation while ignoring the need for additional regulation to ensure that these consolidated enterprises are not able to extract supra-competitive rates.

Another material change in the wireless marketplace over the last decade has been the significant increase in the barriers to entry to the nationwide broadband wireless service market. Unencumbered spectrum has become increasingly scarce over time and a new competitor has very little real chance of assembling a nationwide footprint when competing in a spectrum auction against financially well-heeled incumbents.[14] Even if financing could be secured and spectrum acquired, it would be difficult if not impossible for a new entrant to secure access to, and get all necessary zoning and other approvals

[12] *See* Petition to Deny of Lamar County Cellular, WT Docket No. 05-50, filed Mar. 9, 2005, at 8-9 ("Lamar Petition"); Comments in Opposition of Rural Telecommunications Group, Inc., WT Docket No. 05-50, filed Mar. 9, 2005, at 2, 8-9. *See also Application of Western Wireless Corporation and ALLTEL Corporation*, WT Docket No. 05-50, Memorandum Opinion and Order, FCC 05-138 at paras. 99-109 (rel. July 19, 2005).

[13] With the current mergers, there are essentially two national GSM carriers and two CDMA carriers. This means that the national carriers enjoy a duopoly. As the Commission knows, a duopoly is not conducive to the operation of a free market.

[14] Indeed, with the demise of the Commission-sponsored financing plans, new entrants are required to secure financing to not only construct their networks but also to purchase the spectrum. This poses a significant barrier to new entrants, who would be required to spend billions of dollars with little assurance of a return, especially since the wireless marketplace remains a highly competitive market at the consumer level.

for, all of the antenna sites and related facilities that would be required to build a competitive network in an increasingly congested and complicated wireless environment.[15] And, the scope of a nationwide build-out—particularly for any system designed to be competitive with existing carrier systems that have been developed with more than a 20-year headstart—is so great that the necessary financial resources provide a significant barrier to entry.

Furthermore, the Commission's policy to promote competition is in fact harmed by its failure to require automatic roaming. The Commission has a policy of promoting small businesses and new entrants, many of whom do not have the financial wherewithal or ability to buy or build large national systems. However, since these carriers must compete with the large carriers, in order to support the Commission's designated entity and new entrant policies, the Commission must mandate automatic roaming to allow the small businesses a chance to compete effectively.

The current significant barriers to entry to the establishment of a new nationwide system serve to eliminate one of the principal arguments that incumbents have made against mandated roaming requirements. Allowing unencumbered roaming, opponents argued, would create a disincentive for carriers to expand their service areas and provide facilities-based competition. This argument evaporates when the barriers to entry become so high that there is no realistic prospect of establishing a competing nationwide

[15] It has been MetroPCS' experience that in some areas zoning approvals – even if they are forthcoming – may take several years. In addition to the high costs of acquiring spectrum, the carrying cost of spectrum while zoning and other approvals are obtained cost hundreds of millions of dollars more. In some areas, additional sites may not even be available due to local restrictions. *See MetroPCS, Inc. v. City and County of San Francisco*, Docket Nos. 03-16759 and 03-16760 (U.S. Dist. Ct. N.D. Calif).

system. Indeed, given that existing carriers are incented away from entering into roaming agreements which could undermine their existing market power, the Commission must intervene and mandate that automatic roaming be provided.

The way to foster the "rapid, efficient, Nation-wide" radio communications network envisioned by Section 1 of the Communications Act[16] is to obligate carriers to provide the roaming service that they are not incented by market forces to provide on their own. "The Commission has a long history of regulating mobile radio services for the purpose of encouraging the growth of the mobile services industry so that consumers will have greater options for meeting their communications needs."[17] The Commission also has recognized repeatedly that it may be in the public interest to impose a roaming requirement "where market forces alone are not sufficient to ensure the widespread availability of competitive roaming services, and where roaming is technically feasible without imposing unreasonable costs on CMRS providers."[18] At this point in history, agency intervention is necessary to foster "that ubiquitous roaming on CMRS systems [that is] important to the development of a seamless, nationwide 'network of networks.'"[19]

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[16] Communications Act of 1934, as amended, 47 U.S.C. § 151.

[17] *Implementation of §§ 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd. 1411 at 1414 (1994).

[18] *See NPRM*, para 8*; see also Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services*, WT Docket No. 00-193, Notice of Proposed Rulemaking, 15 FCC Rcd 21628, 21635 (2000).

[19] *NPRM at* para. 8.

III. The Same Legal Principles Should Apply to Both Manual and Automatic Roaming

The Commission's current policy on roaming draws an unsupportable distinction between manual and automatic roaming-manual roaming is required while automatic roaming is not.[20] In the NPRM, the Commission appears to contemplate retaining the distinction by asking a series of discrete questions as to each category of roaming service. The same underlying legal principles, however, should be applied to both automatic and manual roaming arrangements and, accordingly, the Commission should mandate automatic roaming on a commercially reasonable basis predicated on market-based pricing.[21]

The Commission has concluded correctly that "roaming is a common carrier service and that CMRS providers are subject to the common carrier provisions of Title II of the [Communications] Act."[22] Principal among these are: (a) Section 201(a) of the Act which requires that service be provided "upon reasonable request therefor" and that common carriers establish "through routes and charges applicable thereto"; (b) Section 201(b), which requires that rates for common carrier communications services be just and reasonable; and (c) Section 202, which renders it unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications,

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[20] *NPRM at* para. 8.

[21] As is discussed below, roaming services may be denied only where providing them is not technically feasible. However, this determination should be made on a case-by-case basis, and carriers should not be totally exempted from any regulatory requirement to provide automatic roaming upon reasonable request.

[22] *NPRM* at para. 2.

regulations, facilities, or services for or in connection with like communications service.[23] The Commission has applied these statutory provisions in highly analogous circumstances and a series of fundamental principles can be ascertained from these precedents that should be applied in the roaming context:

- The obligation to provide service upon reasonable request means that service must be provided *unless* the provision of service "is not technically feasible or economically reasonable."[24]

- The provision of roaming services must be deemed "technically feasible" *unless* there are "technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier… A determination of technical feasibility does not include a consideration of economic…concerns."[25] The provision of roaming services of a particular nature (*e.g.*, automatic roaming) to an affiliate or to another third party "constitutes substantial evidence" that it is technically feasible to provide roaming services of a similar nature to any other carrier using the same underlying technology (*e.g.*, a CDMA-based system).[26]

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[23] 47 U.S.C. §§ 201(a), 201(b) and 202(a).

[24] *Cf.* 47 C.F.R. § 20.11(a). Nothing in these comments should be interpreted to mean that MetroPCS supports *requiring* a carrier to purchase roaming services from a third party.

[25] *Cf.* 47 C.F.R § 51.5 (Definition of "Technically feasible").

[26] *Cf.* 47 C.F.R. §§ 51.305(c) and (d), 311(c) and (d) and 321 (c).

- The obligation to provide service at "just and reasonable rates" means that rates must be cost-based because "costs are traditionally and naturally a benchmark for evaluating the reasonableness of rates."[27]

- The requirement that the rates, terms and conditions be non-discriminatory means, at a minimum, that a carrier must provide roaming services to a requesting carrier at rates, and on terms and conditions, that are no less favorable than the carrier provides to itself, to its affiliates and to other third parties.[28]

- A carrier refusing roaming service to a requesting carrier on the same terms and conditions, including rates, as such carrier provides the service to its affiliates and third parties (including resellers and MVNOs) should have to prove that the cost to provide the service to the requesting carrier is greater than the cost to provide the service to itself, to its affiliates and to third parties.[29]

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[27] *Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1*, Memorandum Opinion and Order, 4 FCC Rcd 4797, 4800 (1988).

[28] *Cf.* 47 C.F.R §§ 51.313 and 64.2321. The Commission should not only take into account other facilities-based carriers, but also any third parties buying analogous services from the carriers, such as resellers and mobile vertical network operators ("MVNOs").

[29] *Cf.* 47 C.F.R. § 51.809. This principle would give rise to rights akin to those arising under as § 252(i) of the Act where a requesting party would be able to request the roaming arrangement of any affiliate or third party and would not be required to accept other terms, conditions or rates offered by the carrier.

MetroPCS respectfully submits that the enunciation by the Commission of a statement of basic roaming principles of this nature—coupled with the procedural safeguard discussed in Section IV below—will serve the Commission's objective of enabling wireless customers to have a reasonable opportunity to enjoy the benefits of roaming serves at a fair price.[30]

IV. Roaming Agreements Must be Publicly Available and Adoptable

Since the passage of the Telecommunications Act of 1996,[31] great strides have been made in the extent to which intercarrier interconnection agreements are being put in place by voluntary negotiation rather than through adjudication. Indeed, the progress has been so dramatic that certain carriers who previously thought that the entire intercarrier compensation system needed to be dramatically overhauled have changed their view and now are advocating retaining the *status quo*.[32] In the experience of MetroPCS, the two most important factors which make the voluntary negotiation process work are: (a) the requirement that incumbent LECs file publicly a copy of every interconnection agreement entered into with a third party, regardless of whether it was entered into by

[30] The Commission has in the past set forth a statement of regulatory principles that was intended to encourage private parties to enter into voluntary agreements that met important regulatory objectives. *See, e.g., Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, Policy Statement, FCC 05-151 released September 23, 2005) (setting forth a series of regulatory principles to be applied by the Commission to assure that telecommunications providers of Internet Access or Internet protocol - enabled services operate in a neutral, open, affordable and accessible manner); *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Memorandum Opinion and Order, 59 RR 2d 1275 (1986) (setting forth a statement of the FCC's policy on the basic principles governing interconnection of wireless systems).

[31] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[32] *See* Reply Comments of Verizon in Response to Further Notice of Proposed Rulemaking. CC Docket No. 01 pp. 20-21 (filed July 20, 2005).

negotiation or by arbitration;[33] and, (b) the ability of a requesting carrier to adopt a previously negotiated agreement to receive services on the same terms and conditions, including rates.[34] In short, the best way to assure that services are being provided on a non-discriminatory basis and at a reasonable rate is to bring transparency to the process so that a requesting carrier has the information needed to determine whether or not roaming services are being provided fairly.

At present, there is no transparency in the roaming agreement negotiation process. Roaming agreements are not filed or published, nor are they publicly available through other means, such as merger approvals.[35] Worse yet, most carriers insert confidentiality provisions into roaming agreements (and pursue protective orders in regulatory and judicial adjudications involving such agreements) that actively prohibit either party from revealing the terms and conditions of the service to third parties. The result is a "black box" that leaves a requesting carrier without the basic information it needs to ascertain whether services are being offered on a competitively neutral basis. This means that the complaint procedures that are available under Section 208 of the Act are largely meaningless since a requesting carrier generally lacks sufficient information to determine

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[33] *See* 47 U.S.C. § 252(h).

[34] *See* 47 U.S.C. § 252(i).

[35] Carriers should not be heard to claim that roaming rates are competitively sensitive and might be confidential. Roaming is a common carrier service that must be offered on a non-discriminatory basis. Offering unique unpublished rates to a preferred customer should not be allowed and the Commission should find that such a practice is a violation of the Act.

whether it is being discriminated against or whether the charges being imposed are reasonable.[36]

Moreover, the carriers who have entered into these agreements are not volunteering these agreements or the salient terms to the Commission. At several points in time, the Commission has requested that carriers provide information to the Commission concerning the nature and extent of roaming services that are available in the marketplace. For example, in February 2005, the Wireless Bureau released a *Public Notice* seeking concrete data on the availability of roaming, and on the terms and conditions on which roaming services were being provided.[37] Many of the same questions have been posed in the *NPRM* as they were in the prior proceedings examining the roaming market. Despite these repeated requests, major carriers generally have declined to provide any concrete data on the nature and extent of their roaming arrangements, the identity of the parties to existing agreements and the terms thereof. MetroPCS suspects that the reason for this reluctance is that discrimination is widespread.[38] The only way for the Commission to get the information it needs, to give

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[36] Moreover, because these agreements are not publicly available, carriers may be able to insert provisions which may be anticompetitive because they serve to either reduce or eliminate competition (*e.g.*, an agreement that allows a party to roam in a particular territory only if the requesting carrier agrees not to build its own facilities there). Given that roaming agreements are now in many instances between competing carriers, the concern that provisions may be added that limit competition is very real. Therefore, it is incumbent on the Commission to make these agreements public so that carriers are not able to maintain their market power through these agreements.

[37] *WTB Seeks Comment on CMRS Market Competition*, WT Docket No. 05-71, Public Notice, DA 05-487 released February 24, 2005 at Section II.D.

[38] This is a situation where greater visibility serves the public interest. Since these agreements between competitors are not available to third parties, and their terms are kept secret, these agreements provide an enticing breeding ground for anticompetitive provisions and restrictions.

other carriers access to the information they need, and to ensure that these agreement are not being used to inappropriately maintain market power, is to require carriers to make copies of roaming agreements publicly available.[39]

MetroPCS appreciates the fact that CMRS services have been detariffed at the federal and state levels[40] and that CMRS carriers are generally exempt from the requirement that they file with the Commission copies of contracts with other carriers.[41] These policies do not prevent the Commission from requiring carriers to make roaming agreements publicly available when such requirement will serve the public interest. The detariffing of CMRS services, and the relaxation of contract filing requirements, were based on the finding that CMRS services were highly competitive and that marketplace forces were adequate to regulate carrier behavior. The earlier discussion establishes that there is not sufficient competitive parity in the roaming segment of the market to rely solely upon marketplace forces to regulate conduct and assure that carrier practices are fair and reasonable.[42] As a consequence, the Commission has the power based upon changed circumstances to require that roaming contracts be filed, and should do so.

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[39] Adopting such a requirement need not give rise to elaborate Government oversight. The Commission need only require that carriers provide copies upon request, post the subject agreements on their company websites, and provide electronic access.

[40] *See* 47 C.F.R § 20.15 (c) (prohibiting CMRS carriers from filing tariffs for interstate services); 47 U.S.C. § 332 (c)(3) (preempting states from regulating CMRS entry and rates).

[41] 47 C.F.R § 20.15(b)(1).

[42] Indeed, given the paucity of roaming agreements with carriers and the widespread nature of MVNOs, it should be apparent to the Commission that the marketplace forces are not working properly. MVNOs only provide non-facilities-based competition to the underlying carrier while a third-party carrier purchasing roaming services often provides facilities-based competition. The Commission should be concerned that the national carriers, by favoring non-facilities-based competitors over facilities-based competitors, are seeking to control competition.

V. Responses to Specific Questions Posed in the *NPRM*

Applying the basic regulatory principles and legal concepts discussed above, MetroPCS offers the following responses to certain of the specific inquiries made by the Commission in the *NPRM*:

A. The Commission Should Retain the Manual Roaming Rule

In the *NPRM*, the Commission seeks up-to-date information on the continued utility of the manual roaming rule and asks whether manual roaming has been displaced by automatic roaming.[43] The manual roaming rule continues to serve an important role despite the fact that automatic roaming is supplanting and, if mandated, will largely supplant manual roaming in many circumstances. Extending the roaming obligation to automatic roaming where technically feasible will reduce the number of instances in which manual roaming is necessary, but will not eliminate this need altogether. Manual roaming will provide an important safety net in circumstances where an automatic roaming agreement is not in place, such as where a new carrier has not yet implemented an automatic roaming agreement or addressed any technical issues.

The Commission previously determined that roaming is a common carrier service.[44] None of the industry or technological changes that have occurred in the past decade alter the fundamental characteristics of roaming service or the legal considerations that led to this classification. Indeed, consolidation in the industry and the increasing scarcity of nationwide spectrum have intensified the need for roaming to

[43] *NPRM* at paras. 22-23.

[44] *See Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd 9462.

continue to be classified as common carrier service that is subject to statutory obligations which might not be guaranteed by market forces. Consequently, roaming must continue to be classified as a common carrier service, which must be provided by a common carrier "upon reasonable request therefor" under Section 201 of the Communications Act of 1934, as amended (the "Act").

In sum, the manual roaming requirement should not be eliminated or made subject to a sunset provision.[45]

B. The Commission Should Extend the Roaming Requirement to Automatic Roaming

The earlier referenced finding that roaming is a common carrier service compels the Commission to extend the roaming requirement to automatic roaming. The Commission did not limit its earlier common carrier classification to manual roaming.[46] MetroPCS recognizes that the Commission earlier declined to impose an automatic roaming requirement due to what it termed the "inconclusiveness" of the record before it.[47] Circumstances are substantially different now, and the Commission must now extend the requirement to include automatic roaming. A common carrier is obligated to provide service upon reasonable request. A blanket exemption of automatic roaming

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[45] In addition, MetroPCS does not support any sunset of an automatic roaming requirement. Sunset provisions are appropriate where, for example, market forces or technical change is expected to reduce the need for regulation over time. In the instance of roaming, however, given the continued consolidation of the industry (and the view that it will intensify over time), there is no logical reason to sunset any roaming requirement, including automatic roaming.

[46] *Id.* at 9469-70.

[47] Although the prior record may have been limited, there can be no doubt now that automatic roaming is widespread given the rise of, and extreme popularity of, nationwide plans which do not differentiate between local and roaming services.

from the roaming requirement could only be justified if the Commission were to find that automatic roaming is not technically feasible or economically reasonable in all instances. Certainly the Commission can make no such finding. Indeed, the Commission already has made a contrary finding, noting that "automatic roaming is far more convenient for a subscriber than manual roaming and, as a practice, has become increasingly widespread."[48] Based on this finding, automatic roaming should be mandated.[49]

Section 153(46) of the Communications Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used*."[50] The italicized phrase is one of many portions of the Communications Act that gives rise to the important regulatory principle that regulatory obligations should be technologically neutral to the extent possible.[51] A Commission policy that imposes

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[48] *Application of Western Wireless Corporation and ALLTEL Corporation*, WT Docket No. 05-50, Memorandum Opinion and Order, FCC 05-138 at para 101 (rel. July 19, 2005).

[49] Indeed, the Commission should turn the test around and not allow any blanket on other exemption for automatic roaming unless the industry can show by substantial evidence that it would not be technically feasible or economically reasonable to provide automatic roaming.

[50] 47 U.S.C § 153(46) (emphasis added). The fact that automatic roaming may be viewed as a carrier-to-carrier service does not alter the common carrier nature of such service. Automatic roaming services offered by one carrier to another clearly are "effectively available directly to" the second carrier's subscribers.

[51] *See, e.g.,* Federal Communications Commission 2002 Biennial Regulatory Review - Staff Report of the Wireless Telecommunications Bureau, 18 FCC Rcd 4243, Part 24 Appendix (2002) (referencing an FCC finding that a technologically neutral approach provides for the efficient and effective deployment of advanced telecommunications services).

regulatory requirements that are fundamentally different for automatic roaming and manual roaming would fly in the face of the technology neutrality objective.[52]

In sum, since the Act requires that common carriers provide communication services "upon reasonable request therefor" at prices that are "just and reasonable," and not unreasonably discriminatory, carriers are already required to provide automatic roaming upon reasonable request.[53]

C. Claims of Discrimination Should be Judged on a Market-Specific Basis, But with Certain Presumptions

The Commission asks whether it should evaluate discrimination claims on a market-specific or nationwide basis.[54] Because technical feasibility is a relevant consideration, and because there may be different technical capabilities from one market area to another even when a single nationwide service provider is involved, MetroPCS considers it to be appropriate to judge discrimination claims on a market-by-market basis. Nonetheless, MetroPCS believes that various rebuttable presumptions should apply when conducting the market-specific evaluation. For example, if a carrier allows its own customers to roam automatically among and between a variety of the carrier's markets, the presumption should be that automatic roaming is technically feasible in all such

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[52] Since the differences between manual and automatic roaming from a customer standpoint are substantial (*e.g.*, manual roaming does not permit 10-digit dialing on the first call and requires the customer to establish an account with the roaming carrier, while automatic roaming allows 10-digit dialing for all calls), the Commission should impose a heavy burden on any carrier that seeks to show that automatic roaming should not be accommodated.

[53] *See* 47 U.S.C. §§ 201, 202.

[54] *NPRM* at para. 35.

markets. Thus, the burden would shift to the providing carrier to justify a denial of automatic roaming service in one of these markets while allowing it in another.

Similarly, if a carrier voluntarily provides automatic roaming service to its affiliates or any third-party carrier in a particular market, the presumption should be that it is capable of providing such service to another carrier operating with the same technological platform (*e.g.*, CDMA). This presumption could only be rebutted by the serving carrier upon a substantial showing that there were unique technical considerations that made automatic roaming feasible in one case but not in the other. Otherwise, a carrier would be able to discriminate among and between similarly-situated competitors.

Further, providers should not be permitted to offer roaming agreements to affiliates with terms and conditions that differ from those offered to non-affiliates.[55] Discrimination is no less reasonable—indeed it is more pernicious—if it benefits an affiliate of the discriminating carrier. To find otherwise would eviscerate Section 202 of the Act. Notably, nothing in Section 202 suggests that Congress intended to exempt affiliates from this requirement. Indeed, in many contexts the Commission has expressly required carriers to offer third parties terms and conditions of service no less favorable than those the carrier offers to its own affiliates.[56] The Commission should establish a

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[55] *Id.* at para. 36.

[56] *See, e.g.*, *Craig O. McCaw*, File Nos. ENF-93-44, 05288-CL-TC-1-93 et al., Memorandum Opinion and Order, 9 FCC Rcd 5836, 5895 (prohibiting AT&T/McCaw from offering proprietary product development services and associated products to its cellular affiliate on more favorable terms than those offered to non-affiliates); 47 C.F.R. § 51.323(f)(4) (providing that neither an incumbent LEC nor its affiliates may reserve collocation space on terms more favorable than those offered to non-affiliates); 47 C.F.R. § 20.20 (requiring that an incumbent LEC provide tariffed services to its CMRS affiliate at tariffed rates, terms, and conditions, and that other services be provided on an arms'-length basis); *see also* 47 C.F.R. § 51.313(b)

(continued...)

presumption that if a carrier offers services to itself, its affiliates, or third parties, the same rates and terms and conditions should be available to any requesting carrier unless the providing carrier can show with substantial evidence that either (a) its costs to provide such services are higher than those to provide services to itself, its affiliates, or third parties, or (b) the provision of services is not technically feasible.[57]

Furthermore, an automatic roaming requirement should allow full access to all technical features of a carrier's system if such features are provided to its affiliates or third parties.[58] So long as such features allow customers "to communicate or transmit intelligence of their own design and choosing," they are common carrier services.[59] While no carrier should be forced to alter its network with respect to features that are technically incompatible with the handsets used by the customers of another carrier, the carrier that refuses to make such features available should bear the burden of demonstrating incompatibility as such carrier alone has full access to the necessary information regarding its own network.[60]

(...continued)

(requiring that an incumbent LEC provide access to unbundled network elements on terms and conditions no less favorable than the incumbent provides to itself).

[57] This rule is justified here just as it was justified in the instance of incumbent local exchange carriers who had market power and the incentive to preclude interconnection. *See* 47 C.F.R. § 51.809.

[58] This would include all enhanced services, such as 3-way calling, call waiting, etc., other services which are not unique to that carrier's network and would include data services. Without requiring such broad-based access, the requirement to provide roaming will be diminished over time as carriers migrate to providing voice services over data channels, such as VoIP or EVDO Revision A.

[59] *See Interconnection and Resale Obligations Second Report and Order* at 9469.

[60] If a feature is incompatible with the requesting carrier's network or handsets, that should only preclude providing the incompatible feature—not eliminate the roaming requirement entirely. Further, to prevent a carrier from engineering around the roaming requirement, a providing carrier should be required to provide

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D. Steps Need to Be Taken to Make the Roaming Policy Enforceable

In the *NPRM*, the Commission asks whether the remedies provided under Sections 201, 202, 208, 251, and 332 of the Act are sufficient to address unreasonable or discriminatory behavior in connection with roaming agreements.[61] As earlier noted, under the present regulatory regime, these remedies are grossly inadequate due to the lack of any publicly-available information concerning the terms and conditions under which national carriers offer roaming to each other, their respective affiliates, or unaffiliated carriers.[62] Section 252(a)(1) of the Act requires that local exchange carriers ("LECs") file interconnection agreements with state public service commissions.[63] The public filing requirement serves two important functions. First, it allows carriers to confirm the terms and conditions to which service is provided to other carriers so that they may pursue available remedies under the Act if another carrier has engaged in unreasonable or discriminatory behavior.[64] Second, this requirement provides LECs a strong incentive to self-police and ensure that they offer interconnection on reasonable terms to other carriers. MetroPCS submits that the public filing requirement has significantly

(...continued)

all technical information related to its roaming services to a requesting carrier and to provide the necessary assistance (to the extent it provides such assistance to its affiliates and third parties) to allow such requesting carrier to utilize the providing carrier's roaming services.

[61] *NPRM* at para. 34.

[62] If the Commission for some reason elects not to adopt an automatic roaming rule, it should at least require that roaming agreements be made publicly available.

[63] 47 U.S.C. § 252(a)(1).

[64] Such public access also eliminates the ability or incentive for carriers to insert terms in these agreement which may be anticompetitive.

contributed to the decline in the number of interconnection-related disputes in recent years.[65]

Requiring roaming agreements to be made publicly available is clearly within the Commission's authority. Under Section 211 of the Communications Act, the Commission has the explicit authority to require the filing of any contract to which a subject carrier is a party.[66] And, such a requirement would have minimal administrative costs, and would result in greater self-regulation.[67]

In the absence of a public filing requirement, the *status quo* is unlikely to change with respect to roaming agreements. A regional carrier that believes it is being discriminated against by a national carrier presently has little, if any, realistic possibility of redress against such carrier because the smaller regional carrier lacks the basic information needed to determine whether or not this belief is correct and will not likely be willing or able to incur the significant expense of a complaint proceeding without any concrete evidence in support of its position.

E. An Automatic Roaming Requirement Would Benefit Consumers by Promoting Increased Competition

The Commission has asked in the *NPRM* whether large carriers discriminate in roaming agreements against small and rural carriers, and the extent to which such

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[65] *See, e.g.*, "EB – Local Telephone Competition Enforcement Actions," http://www.fcc.gov/eb/LoTelComp/enf.html (visited Nov. 20, 2005).

[66] 47 U.S.C. § 211 (a) and (b).

[67] Indeed, since all national carriers already operate web sites, the requirement that a carrier be required to merely place the agreements on its web site and provide them upon request would not impose any meaningful burden on such carriers.

behavior harms consumers.[68] In the experience of MetroPCS, the national carriers do discriminate against independent carriers such as MetroPCS, and either refuse to negotiate roaming agreements at all or make commercial demands that a large carrier would never be expected to accept. Such behavior must be addressed by the Commission, as these actions harm the customers of MetroPCS and other independent wireless carriers, who must pay excessive roaming rates or face the possibility of having no automatic roaming at all in certain areas.

Recent changes in the U.S. wireless industry also weigh strongly in favor of an automatic roaming rule. For example, there are now four national carriers rather than six. This means that the remaining regional carriers have fewer potential roaming partners, and are faced with "take it or leave it" roaming choices if they are lucky enough to be offered roaming agreements at all. Further, with consolidation, the possibility that a national carrier will provide service in the same territory of a regional or rural carrier also has increased dramatically. Moreover, most of the available spectrum has been claimed by the existing carriers, so it would not be feasible for a fifth national carrier to emerge even if it had the financial wherewithal to do so. In any event, the headstart enjoyed by the national carriers in building out their networks means that it would be virtually impossible for a new entrant at this late date to achieve the necessary economies of scale to compete with these carriers.

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[68] *NPRM* at para. 41.

Strong regional carriers, serving discrete geographical markets such as those served by MetroPCS, are the only viable alternative to the four national carriers. Consumers in the regions served by independent carriers demand the ability to roam on other carriers' networks when they travel outside their home market, and such consumers will lose an alternative if regional carriers are unable to obtain roaming agreements with national carriers.

F. An Automatic Roaming Requirement Will Not Discourage Investment in Wireless Networks

The Commission asks whether adopting an automatic roaming requirement will discourage investment in wireless networks if such a requirement applies to in-market roaming.[69] MetroPCS submits that it will not. While carriers may not charge "unreasonable" prices for roaming services, MetroPCS expects that all such services that it acquires from other carriers will be provided at a profit. It therefore defies logic that MetroPCS or any other carrier would use in-market roaming in lieu of building out its own network—such behavior would either reduce its profits or increase the prices it must charge its own customers (thereby reducing its market share), and also would increase the profitability of MetroPCS' competitors.[70]

In the *NPRM*, the Commission asks similar questions with respect to investment in 2.5G or 3G, *i.e.*, whether a carrier will seek a "free ride" on the network of another

[69] *Id.* at para. 35.

[70] Further, the national carriers have embraced MVNOs that are in-region non-facilities based competitors. It would make no sense to allow the national carriers to provide roaming access to MVNOs but at the same time deny the ability of facilities-based carriers to roam in those areas they did not build. Indeed, the Commission has a strong policy in favor of facilities-based competition, and allowing the national carriers to favor resale over roaming turns this policy on its head.

carrier without upgrading its own network.[71] For the reasons described above, a business model that relies for advanced services primarily on roaming is simply indefensible. Moreover, it is inconceivable that a carrier such as MetroPCS would market handsets with advanced features that operate only on a competitor's network. Rather, any CMRS provider that seeks to build a sustainable business will seek to upgrade its own network to allow the provision of advanced services so that it is not forced to choose between offering its customers outdated services and subsidizing the network upgrades of its competitors.[72]

At the time that the Commission previously declined to adopt an automatic roaming rule and suggested that such a rule would discourage network build-out, the wireless industry was not yet mature and such concerns may have had some basis in reality. However, MetroPCS respectfully submits that this concern, which will undoubtedly be raised by national carriers, is a red herring. As the national carriers know, any carrier that pursues a strategy based on roaming at the expense of building its own network is not likely to remain in business. Any argument to the contrary lacks a foundation in either sound business principles or logic. Further, since licensees now must purchase their spectrum, the carrier has a greater economic incentive to initiate its own

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[71] *Id.* at para. 45. In argument, no free ride can exist when a carrier is not licensed to provide service in the area where roaming is being provided.

[72] The notion that some competitors may have advanced features where others may not is also simply not in line with the development of the industry. All of the carriers essentially buy their network gear from the same manufacturers, so the features available to one are generally available to all. Further, since many of these features are enhancements or upgrades to existing systems and pose only incremental costs, it would not make any sense for a carrier to forestall upgrading its systems in favor of roaming on the other carrier's system, especially since any roaming would include the competitor's profit margin.

service and earn a return on the spectrum investment rather than roaming on another system for the long term.

VI. Conclusion

The foregoing premises having been duly considered, MetroPCS respectfully requests that the Commission move promptly to establish an automatic roaming rule that conforms to the principles enunciated in these comments.

Respectfully submitted,

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