

**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
)	

REPLY COMMENTS OF METROPCS COMMUNICATIONS, INC.

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SUMMARY

MetroPCS Communications, Inc. (“MetroPCS”) is a provider of innovative broadband wireless telecommunications services to nearly 2,000,000 subscribers, many of whom belong to demographic segments historically underserved by the large national carriers. In these reply comments, MetroPCS responds to the comments filed by various parties in response to the *Notice of Proposed Rulemaking* in WT Docket No. 05-265 relating to the obligations of commercial mobile radio service (“CMRS”) operators to provide automatic roaming services.

As explained in greater detail below, the comments filed in this proceeding demonstrate widespread agreement on certain core principles that should be taken into account when evaluating the record and determining what actions should be taken with respect to automatic roaming:

- Automatic roaming is of vital importance to the customers of wireless carriers in today’s CMRS marketplace.
- Automatic roaming is offered on a widespread basis in the CMRS industry, and early technical obstacles to automatic roaming have been largely overcome.
- Roaming—be it manual or automatic—is a common carrier service, as previously found by the Commission, and is therefore subject to Sections 201 and 202 of the Act.

However, the consensus described above evaporates when one goes beyond these core areas of agreement. In fact, the comments generally portray two separate, parallel universes. In the universe inhabited by the four large national carriers, the relevant market for automatic roaming is the retail CMRS marketplace, competition is vibrant, and there are market-based incentives for large carriers to provide automatic roaming services to small, rural, and regional carriers at just, reasonable, and non-discriminatory terms and conditions. However, in the

universe inhabited by all of the other commenting parties, the market for roaming service is the wholesale roaming market where the national carriers have market power—often in the form of a monopoly or duopoly—which they use to extract supra-competitive rates or other unreasonable terms from their smaller roaming partners or refuse to deal with them altogether. The real-world experiences described by the independent carriers, such as Leap Wireless, MetroPCS, and SouthernLINC Wireless, show that the parallel universe described by the four large national carriers simply does not exist.

These reply comments show that the adoption of an explicit automatic roaming requirement would serve the public interest because a lack of competition in the *wholesale* market for automatic roaming services harms consumers. As explained by MetroPCS and other regional, rural, or small carriers, the fact that the CMRS *retail* market is relatively competitive is simply not relevant because the *retail* market is not the relevant product market. Since each CMRS operator faces technological constraints that prevent its subscribers from roaming onto a carrier with an incompatible air interface—*e.g.*, customers of a CDMA-based carrier may not roam on a GSM network, etc.—roaming services among carriers with different technological platforms are not substitutable. This means that in many geographic areas, the wholesale automatic roaming market is properly characterized as a monopoly or duopoly, and the non-nationwide commenting parties show that the national carriers do, in fact, deal with smaller regional and rural carriers in a manner that could *only* occur in a less-than-competitive market. Moreover, the failure to have a competitive market for roaming services will reduce the opportunities and abilities for designated entities and smaller carriers to participate in spectrum auctions.

MetroPCS also urges the Commission to undertake an independent investigation pursuant to its authority under Section 403 of the Act to determine whether the market is in fact competitive and whether unjust or unreasonable discrimination is occurring. Given the confidentiality restrictions contained in many—if not most—roaming agreements, coupled with a well-founded fear of retaliation by large carriers, it is unlikely that many carriers will voluntarily disclose details of their roaming negotiations in a public docket.

Finally, MetroPCS requests that the Commission strengthen its existing Section 208 procedures with respect to complaints involving roaming disputes by requiring that roaming agreements be made publicly available. This would allow carriers to have the necessary facts that could support a *prima facie* claim under Section 201 or 202 of the Act *before* expending the time and funds to pursue a complaint, and would deter large carriers from acting in ways that violate these provisions. The Commission should further strengthen the Section 208 procedures by adopting certain presumptions that would assist in determining whether a carrier has engaged in unjust or unreasonable conduct, including unjust or unreasonable discrimination.

Only by adopting an explicit automatic roaming requirement, consistent with its prior determination that roaming is a common carrier service, can the Commission ensure the availability of automatic roaming services to all Americans. To do nothing would jeopardize the availability of such services, particularly to the customers of MetroPCS and similarly-situated carriers. As many of these customers have been largely overlooked by the large national carriers, such a result would not serve the public interest and would contravene the Commission's goal of promoting universal service. In the final analysis, the only beneficiaries of such inaction would be the large national carriers.

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REPLY COMMENTS OF METROPCS COMMUNICATIONS, INC.

MetroPCS Communications, Inc. (“MetroPCS”),¹ by its attorneys, respectfully submits its reply comments in response to 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. PRELIMINARY STATEMENT

In the *NPRM*, the Federal Communications Commission (“FCC” or “Commission”) seeks comment on whether or not to impose an automatic roaming

¹ For purposes of this Petition, the term “MetroPCS” refers to the parent company (MetroPCS Communications, Inc.) and all of its FCC-licensed subsidiaries. MetroPCS provides flat-rate, no-contract CMRS wireless services in five major markets and serves nearly 2,000,000 subscribers, many of whom belong to demographic groups historically underserved by the large national carriers.

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).

requirement with respect to Commercial Mobile Radio Services (“CMRS”).³ As is demonstrated in greater detail below, the comments filed in this proceeding show widespread agreement among both large and small carriers on certain core principles that lie at the heart of the proceeding. For example, commenting parties generally agree that: (1) automatic roaming is an important service; (2) automatic roaming services are widely available in the CMRS industry; and (3) roaming is a common carrier service subject to Sections 201 and 202 of the Communications Act of 1934, as amended (the “Act”).

However, the consensus evaporates when it comes to whether there is sufficient competition in the automatic roaming marketplace to create a fair and efficient market and whether there is unjust and unreasonable discrimination in the automatic roaming market. Indeed, it is as if the large national carriers, on the one hand, and the smaller local, rural, and regional carriers on the other hand, are operating in different, parallel universes. Of course, this is not a policy dispute but rather one of facts—whether the roaming market is competitive and whether large national carriers are making automatic roaming available to rural and regional carriers on a just and reasonable non-discriminatory basis. The goal of the Commission must be to determine which universe reflects reality, and to assure that automatic wireless roaming services are truly available on a reasonable, ubiquitous, and non-discriminatory basis to all carriers, large and small.

³ This issue is distinct from the issue of whether a carrier, once it offers automatic roaming services to third parties, has an obligation to offer automatic roaming services to others on a non-discriminatory basis. As the FCC has already determined that roaming is a common carrier service, there can be no argument that carriers that offer such service to others are also obligated to offer automatic roaming services to any requesting carrier on non-discriminatory terms, including rates.

II. THE RECORD REFLECTS AGREEMENT ON IMPORTANT CORE PRINCIPLES

The Commission's long-standing inquiry into roaming issues has tended to polarize carriers. The Commission's current inquiry is no different. However, the Commission must take note when there is widespread agreement on certain core principles.

A. The Commenters Agree That Roaming Services Are Highly Important In Today's CMRS Marketplace

Virtually all of the parties who have commented in this proceeding agree with the Commission's previous determination that roaming services are "important to the development of nationwide, ubiquitous, and competitive wireless voice telecommunications."⁴ For example:

- Verizon Wireless – "Customers increasingly demand the ability to travel outside of their home markets and use their wireless services as they travel."⁵
- Sprint Nextel – "[The company's] strategic roaming alliances benefit customers of both Sprint Nextel and its new partners [and] allow each carrier's customers to enjoy a full suite of services."⁶

⁴ 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 (1996).

⁵ Comments of Verizon Wireless ("Verizon Wireless Comments") at 10.

⁶ Comments of Sprint Nextel ("Sprint Nextel Comments") at 7.

- T-Mobile – “As a consequence [of its roaming agreements], T-Mobile’s subscribers have access to an area of more than . . . (650,000) square miles in the United States where T-Mobile does not have network facilities.”⁷
- Leap Wireless – “[S]ome of Leap’s customers need the flexibility of using their mobile wireless service when they travel – not only for convenience but for the added safety they can obtain through ready access to mobile phone service when they are away from their home market.”⁸
- Cingular Wireless – “Even the nationwide carriers need roaming agreements to fill in coverage gaps.”⁹
- SouthernLINC Wireless – “It is only through roaming that *all* consumers are able to obtain access to mobile services nationwide while ensuring that such services are deployed as widely as possible”¹⁰

⁷ Comments of T-Mobile USA, Inc. (“T-Mobile Comments”) at 3.

⁸ Comments of Leap Wireless International, Inc. (“Leap Comments”) at 5.

⁹ Comments of Cingular Wireless LLC (“Cingular Wireless Comments”) at 11.

¹⁰ Comments of SouthernLINC Wireless (“SouthernLINC Comments”) at 15 (emphasis in original).

- MetroPCS – “[T]he capability to provide automatic roaming is becoming a requirement for carriers in today’s marketplace.”¹¹

In fact, no one disputes the notion that roaming services are important to the customers of all providers of CMRS, both large and small, national and regional, urban and rural. Moreover, the commenting parties generally agree that automatic roaming generates a substantial amount of CMRS traffic and that the public benefits when automatic roaming services are broadly available.¹² The near-unanimous agreement on the importance of fostering ubiquitous, reasonably-priced roaming services provides a valuable backdrop to the Commission’s analysis of the comments filed in this proceeding, and underscores the need for a prompt and well-considered resolution of the issues raised in the *NPRM*.¹³

B. The Parties Agree That Automatic Roaming Is Widespread and Early Technical Obstacles Have Been Overcome

All of the comments to this proceeding agree that automatic roaming is being offered on a widespread basis in the industry by and between different carriers using the same air interface. For example:

¹¹ Comments of MetroPCS Communications, Inc. (“MetroPCS Comments”) at 3.

¹² *See, e.g.*, T-Mobile Comments at 6 (observing that “roaming has developed into a vibrant aspect of the industry, generating approximately \$4.2 billion in revenues in 2004”).

¹³ Unlike the record that may have existed in prior proceedings, the fact that all carriers believe automatic roaming to be an important service weighs in favor of the Commission taking action in this proceeding.

- Cingular Wireless – “There has been a proliferation of automatic roaming agreements and there is no evidence that roaming services are unavailable.”¹⁴
- T-Mobile – “T-Mobile has . . . entered more than 45 automatic roaming agreements nationally – that is, with all other GSM/GPRS wireless carriers in the United States.”¹⁵
- Nextel Partners – “[R]oaming agreements are regularly negotiated between carriers, and those agreements have given a vast majority of consumers in the nation access to service plans that allow region-wide or nationwide roaming.”¹⁶

This is an important departure from the prior proceeding, where the Commission concluded that automatic roaming had not developed sufficiently to support the imposition of an automatic roaming requirement. Given that carriers have been able to develop the required systems and deploy the necessary technology to support automatic roaming between systems using the same air interface technology, it is an important core principle that all carriers are now able to automatically roam with other carriers using the same air interface technology.

¹⁴ Cingular Wireless Comments at 10.

¹⁵ T-Mobile Comments at 3 (emphasis in original).

¹⁶ Comments of Nextel Partners, Inc. (“Nextel Partners Comments”) at 5-6. *See, however*, SouthernLINC Comments at 12.

C. The Parties Generally Agree That Roaming Is a Common Carrier Service

As MetroPCS noted in its comments in this proceeding, the Commission already 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 Act.”¹⁷ This key finding means that roaming services are subject to the important principles embodied in Title II of the Act, which include: (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 prohibits a common carrier from making any *unjust or unreasonable discrimination* in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications services.¹⁸

T-Mobile properly states in its comments that “[a]s common carriers subject to Title II of the Act, wireless providers are subject to the provisions of Section 201 and 202 of the Act prohibiting unjust and unreasonable charges, practices, and discriminatory conduct and to the complaint process set forth in Section 208 of the Act.”¹⁹ Cingular

¹⁷ See MetroPCS Comments at 13 (citing *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 at para. 8 (1996)).

¹⁸ See MetroPCS Comments at 13-14 (citing 47 U.S.C. §§ 201(a), 201(b), and 202(a)).

¹⁹ T-Mobile Comments at 18. MetroPCS agrees wholeheartedly with T-Mobile’s summary of the Act, but notes that for the reasons expressed in MetroPCS’s comments, the current Section 208 process is not a realistic option for independent CMRS carriers. See Section IV.C, *infra*, for a discussion of the changes that MetroPCS proposes to the Section 208 process with respect to automatic roaming disputes.

Wireless implicitly acknowledges the applicability of common carrier regulation to roaming services in observing that “[n]o Section 208 complaints have been filed accusing carriers of unjust or unreasonable roaming practices.”²⁰ A Section 208 complaint, of course, may only be filed against a common carrier, and the FCC regulates common carriers as such only to the extent that they are engaged in the provision of common carrier services.²¹ Sprint Nextel also essentially concedes that roaming is a common carrier service when it states that “[a]ny party that believes it has been subject to unreasonable or unjust roaming practices is free to file a Section 208 complaint at the FCC.”²² Since the Section 208 process is only applicable with respect to complaints involving the provision of common carrier services, Sprint Nextel, like T-Mobile and Cingular Wireless, therefore is conceding that automatic roaming is a common carrier service.²³

²⁰ See Cingular Wireless Comments at 21.

²¹ See 47 U.S.C. §§ 208, 153(44).

²² See Sprint Nextel comments at ii. MetroPCS notes that this apparent concession is difficult, if not impossible, to reconcile with Sprint Nextel’s extreme position that “there is no basis in law or policy” for imposing a non-discrimination policy with respect to roaming services. See discussion *infra* Section II.B.3. Either the reference to Section 208 is specious because Sprint Nextel believes Section 208 is inapplicable, or there is no basis for the claim that no non-discrimination policy applies.

²³ It is important to note that the Commission previously found that roaming (without differentiating between manual and automatic roaming) is a common carrier service. The Commission only deferred at that time imposing an automatic roaming requirement because the technology had not fully developed. Since automatic roaming is now widespread, the earlier reasons no longer justify a requirement not to offer it—and indeed the market failures described below mandate such a requirement.

III. AN EXPLICIT REQUIREMENT THAT AUTOMATIC ROAMING BE PROVIDED UPON REASONABLE REQUEST AND AT JUST, REASONABLE, AND NONDISCRIMINATORY PRICES WOULD SERVE THE PUBLIC INTEREST

While Part I describes some important issues on which the commenting parties generally agree, it is difficult—if not impossible—to reconcile the remainder of the comments in this proceeding. It is as if the larger national carriers, on the one hand, and the smaller regional and local carriers on the other hand, are not operating in the same universe. As a general rule, the large national carriers see the roaming market as a robustly competitive one where market forces are operating to make roaming services broadly available on just and reasonable terms and conditions, including rates. For example:

- Verizon Wireless – “Competition is strong in the CMRS marketplace. This competition exerts a downward pressure on roaming rates and ensures that all carriers that wish to enter into an automatic roaming agreement can do so on terms that are not unreasonably discriminatory.”²⁴
- Cingular Wireless – “Carriers across the country had market-based incentives to work out automatic roaming arrangements with other operators providing quality service at a reasonable price in areas that were not already served by their

²⁴ Comments of Verizon Wireless at ii.

networks.”²⁵

- Sprint Nextel – “[A]vailable evidence suggests that there exists competition for roaming services and that American consumers . . . have benefited by the Commission’s reliance on market forces.”²⁶
- T-Mobile – “In T-Mobile’s experience, roaming negotiations reflect the robustly competitive marketplace in which wireless carriers operate.”²⁷

In stark contrast, the rural, regional, and smaller carriers describe the current roaming market as a highly concentrated, non-competitive one in which the large national carriers are using their market power to extract excessive rates or to deny service altogether, thus violating Sections 201 and 202 of the Act. For example:

- MetroPCS – “In the experience of MetroPCS, the national carriers do discriminate against independent carriers such as MetroPCS, and either refuse to negotiate

²⁵ Cingular Wireless Comments at 24.

²⁶ Sprint Nextel Comments at 9.

²⁷ T-Mobile Comments at 4.

roaming agreements at all or make commercial demands that a large carrier would never be expected to accept.”²⁸

- Leap Wireless – “Large carriers have demanded rates for automatic roaming that are on average nearly *four times* higher than the average revenue per minute the carrier has received for comparable service, and nearly *seven times* what one carrier charges some of its affiliated carriers for the same service.”²⁹
- SouthernLINC Wireless – “[T]he current situation in the market for iDEN roaming services is not one of marketplace competition. It is, if anything, a state of *market failure*.”³⁰
- United States Cellular Corporation – “[The manual roaming requirement] does not provide a solution to the problem of ensuring a level of roaming availability which is competitive with the automatic network services provided by national carriers on their own networks.”³¹

²⁸ MetroPCS Comments at 28.

²⁹ Leap Comments at 13 (emphasis in original).

³⁰ SouthernLINC Comments at 15 (emphasis added).

³¹ Comments of United States Cellular Corporation (“USCC Comments”) at 9.

- RTG – “[T]he rates that large carriers are demanding for rural consumers to roam on their networks result from the large carriers’ ability to leverage their market power in an unfair manner.”³²

MetroPCS believes the Commission must separate the wheat from the chaff in this record. However, the fact remains that much of the information the Commission needs to resolve the matters at issue simply is not available to the Commission and is not being volunteered in response to the *NPRM*.³³ As a consequence, MetroPCS reiterates the position set forth in its original comments that the Commission needs to compel carriers – particularly the large national carriers – to provide complete information regarding their existing roaming arrangements and roaming policies.³⁴ Reasoned decision making requires that the regulatory agency have a complete and accurate record, and, for this reason, Congress gave the Commission the tools to conduct fact finding investigations.³⁵ Now is the time for the Commission to exercise its regulatory powers so that it can reach an informed decision with regard to the important issues identified in this

³² Comments of the Rural Telecommunications Group, Inc. and the Organization for the Promotion and Advancement of Small Telecommunications Companies (“RTG Comments”) at 8.

³³ As MetroPCS pointed out in its comments, the failure of the regional and rural carriers to provide their agreements may stem partially from confidentiality provisions and partially from fear of retribution from the larger national carriers. *See infra* at III.B.1.

³⁴ *See* MetroPCS Comments at 17-19. This would include waiving any confidentiality provisions in these agreements to the extent necessary to allow the Commission to review the agreements.

³⁵ *See, e.g.*, 47 U.S.C. § 403.

proceeding.³⁶ In addition to requiring carriers to file copies of all current roaming agreements,³⁷ the Commission should consider engaging an independent expert to prepare an analysis of the submitted agreements designed to address, at a minimum, the following issues:

- Are there material differences in the roaming rates offered by a carrier to other carriers? If so,
 - Are the rates offered to affiliates more favorable than the rates offered to unaffiliated third-party carriers?
 - Are the rates offered to larger carriers more favorable than the rates offered to smaller carriers?
 - Are the rates offered to rural carriers different from those offered to other regional carriers?
 - Are the rates different when the regional or rural carrier provides service in the same area as the national carrier?
 - Are the rates offered to non-facility based competitors (*e.g.*, resellers and MVNOs) more favorable than the rates offered to facility-based competitors?

³⁶ Indeed, given the widespread agreement that automatic roaming is an important service, the public interest would only be served by the Commission developing a complete record at this time.

³⁷ As an initial matter, these filings should be confidential until the Commission decides whether to adopt rules in this proceeding. *See infra* at III.B.1.

- Are there material differences in the rates offered by carriers using one particular technology (*e.g.*, CDMA vs. GSM vs. iDEN) as compared with those offering another technology?
- Are roaming agreements being coupled with other competitive (or anti-competitive) arrangements (*e.g.*, agreements not to enter or construct particular markets or to divest spectrum) indicating that carriers are using their roaming market power to extract competitive concessions?

Answers to these questions, based upon a comprehensive survey of current roaming arrangements, will enable the Commission to assess the true nature of today's roaming market. MetroPCS urges the Commission to develop the fact record to support any conclusions it reaches in this proceeding and MetroPCS believes that once the Commission has the facts it will agree that (a) unjust and unreasonable discrimination exists, which allows national carriers to reap supra-competitive prices, and (b) further regulation is necessary.

A. Lack of Competition in the CMRS Roaming Market Harms the Public Interest

The key issue that underlies the question of whether the Commission should adopt an automatic roaming requirement is whether or not the market for automatic roaming services is fully competitive. As noted above, the commenting parties generally fall into two camps. On the one hand, the vast majority of commenting parties, including MetroPCS, indicate that the market for automatic roaming is not competitive and cite examples of behavior by major wireless carriers that is inconsistent with what one would

expect to occur in a fully competitive market.³⁸ On the other hand, the four large national wireless carriers—*i.e.*, Verizon Wireless, Sprint Nextel, T-Mobile, and Cingular, all of whom apparently inhabit a parallel universe—argue that the relevant markets are fully competitive and that the FCC need not act.³⁹

1. The Wholesale Roaming Market is the Relevant Product Market

Virtually all of the commenting parties agree, at least implicitly, that the relevant product market is the market for wholesale roaming services.⁴⁰ Nevertheless, economist Gregory L. Rosston argues on behalf of Sprint Nextel that the Merger Guidelines issued by the Department of Justice and Federal Trade Commission support a conclusion that

³⁸ As the Commission knows, carriers are generally restricted to roaming arrangements with technologically-compatible carriers. Thus, CDMA carriers like MetroPCS are generally limited to two potential roaming partners in any given geographic area. The Commission previously has concluded that duopoly markets are not robustly competitive. See *Amendment of the Commission's Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, Second Report and Order, 8 FCC Rcd 7700, 7745 (1993) (establishing rules for the Personal Communications Service ("PCS") that effectively ended the cellular duopoly by generally prohibiting incumbent cellular licensees from holding PCS licenses, based on the Commission's desire to ensure that cellular incumbents could "not exert undue market power"). Thus, based solely on the number of carriers—setting aside all other arguments—the roaming services market for CDMA carriers is not a competitive market.

³⁹ As discussed *infra*, for the most part, the national carriers reach this conclusion by ignoring the issue of market definition and apparently assuming that roaming services provided to other carriers are part of the market for generally-available retail services. As shown below, this assumption is both completely unfounded and flies in the face of well-settled economic principles.

⁴⁰ See, e.g., Verizon Wireless Comments at 12-14 (discussing alleged lack of effect "on the roaming market" by recent consolidation in the CMRS industry generally); T-Mobile Comments at 5 (arguing that "CMRS Roaming Is Highly Competitive"); SouthernLINC Comments at 33 (discussing "the separate market for wholesale roaming service"); and Leap Comments at 13 (describing Leap's experiences in the "wholesale markets for automatic roaming"); see also Sprint Nextel Comments at 4 (arguing that "roaming services are competitive"); compare with *An Economic Analysis of How Competition Has Reduced High Roaming Charges*, Gregory L. Rosston (Nov. 2005) ("Rosston Analysis") at 10-14, submitted as attachment to Sprint Nextel Comments.

the relevant product market is CMRS service generally, *i.e.*, a market that includes the CMRS *retail* market.⁴¹ This view of Rosston is fatally flawed.⁴²

The *DOJ/FTC Guidelines* provide that *absent price discrimination*:

[T]he Agency will delineate the product market to be a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products (“monopolist”) likely would impose at least a “small but significant and nontransitory” increase in price. . . . [T]he Agency will begin with each product (narrowly defined) produced or sold by each merging firm and ask what would happen if a hypothetical monopolist of that product imposed at least a “small but significant and nontransitory” increase in price, but the terms of sale of all other products remained constant. If, in response to the price increase, the reduction in sales of the product would be large enough that a hypothetical monopolist would not find it profitable to impose such an increase in price, then the Agency will add to the product group the product that is the next-best substitute for the merging firm’s product.⁴³

In contrast, the *DOJ/FTC Guidelines* provide that a different analysis should govern in cases where *price discrimination exists*:

If a hypothetical monopolist can identify and price differently to those buyers (“targeted buyers”) who would not defeat the targeted price increase by substituting to other products in response to a “small but significant and nontransitory” price increase for the relevant product, and if other buyers likely would not purchase the relevant product and resell to targeted buyers, then a hypothetical monopolist would profitably impose a discriminatory price increase on sales to targeted buyers. This is true regardless of whether a general increase in price would cause such significant substitution that the price increase would not be profitable. The Agency will consider additional relevant product markets consisting of a

⁴¹ See *Rosston Analysis* at 10-14, citing United States Department of Justice and Federal Trade Commission, “Horizontal Merger Guidelines,” Revised April 8, 1997 (“DOJ/FTC Guidelines”).

⁴² Moreover, MetroPCS must point out that based on his report, there is no basis to conclude that Rosston has at his disposal the facts necessary to reach a conclusion that the wholesale roaming market is competitive. As noted above, there is a dearth of evidence in the record and in his report concerning the nature and extent of existing roaming arrangements.

⁴³ *DOJ/FTC Guidelines*, section 1.12.

particular use or uses by groups of buyers of the product for which a hypothetical monopolist would profitably and separately impose at least a “small but significant and nontransitory” increase in price.

Properly considered, the *DOJ/FTC Guidelines* compel a conclusion that the *wholesale* CMRS roaming market is the relevant product market for the purpose of determining whether carriers should be obligated to offer roaming services to other carriers. First, the *DOJ/FTC Guidelines* clearly provide that a product market should be narrowly defined, and broadened only where other, different services would be substituted in the event of a “small but significant and nontransitory” price increase. Under such an approach, the Commission would start with a narrow product definition, such as wholesale roaming services, and then examine the extent to which services offered by other carriers will become substitutes in the event of a price increase. Such products would only be considered part of the relevant market to the extent that they are substitutes for one another. Significantly, as demonstrated by numerous commenting parties, roaming services provided by a carrier using one particular air interface technology (*e.g.*, CDMA) are not substitutes for roaming services provided by a carrier using a different technology (*e.g.*, GSM).⁴⁴ This means that even in the absence of price discrimination—*i.e.*, in the parallel universe apparently inhabited by the four national carriers—the wholesale roaming market is clearly the relevant product market.

⁴⁴ See, *e.g.*, *Wholesale Pricing Methods of Nationwide Carriers Providing Commercial Mobile Radio Service: An Economic Analysis*, ERS Group (Nov. 28, 2005) (“ERS Report”) at 7, submitted as Attachment A to Leap Wireless Comments (stating that “the wholesale market for roaming services for each technology is a separate market because neither regional operators nor their subscribers have any ability to substitute”). We note that despite speculation concerning the future availability of handsets that would allow, *e.g.*, a GSM subscriber to roam on a CDMA network and vice versa, no commenting parties
(continued...)

The second reason why the wholesale roaming market is the relevant product market is that the first analytical method described above applies only in cases where there is no price discrimination. In this proceeding, however, numerous commenting parties have presented evidence indicating that the national carriers can and do unjustly and unreasonably discriminate in the wholesale roaming market.⁴⁵ Accordingly, the Commission should follow the second analysis above and examine “additional relevant product markets consisting of a particular use or uses by groups of buyers of the product for which a hypothetical monopolist would profitably and separately impose at least a ‘small but significant and nontransitory’ increase in price.” In other words, the Commission should separately examine the portions of the overall CMRS markets that consist of particular uses (purchase of roaming services for resale) by groups of buyers (competing carriers).

As noted above, the *Rosston Analysis* contends that the “appropriate product market is CMRS service,” *i.e.*, all of the various markets that relate to CMRS, including the CMRS retail market.⁴⁶ This argument relies primarily on the FCC’s analysis in the AT&T Wireless/Cingular merger, and does not appear to be based on any independent economic analysis. However, as shown below, the *Rosston Analysis* ignores important

(...continued)

have indicated definitively if or when such handsets will be available even to the national carriers, much less to independent CMRS operators, who have much less control over the handset manufacturing process.

⁴⁵ See, e.g., *ERS Report* at 11 (indicating that national carriers charge Leap Wireless as much as seven times the rates charged to mobile virtual network operators).

⁴⁶ See *Rosston Analysis* at 12 (citing *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, WT Docket No. 04-70, 19 FCC Rcd 21522 (2004) (“AT&T Wireless/Cingular Order”)).

aspects of the roaming discussion included in the *AT&T Wireless/Cingular Order*, and, more importantly, incorrectly assumes that the circumstances present in that particular transaction necessarily provide an accurate reflection of the current CMRS roaming market as a whole.

In the *AT&T Wireless/Cingular Order*, the FCC found that “if any mobile telephony customers . . . were to find that the roaming aspects of their wireless service plans became less favorable . . . they would always have the option not only to upgrade to a GSM plan . . . but to switch to a CDMA-based carrier altogether.” This analysis, in other words, focused on the retail customers of the combined AT&T Wireless/Cingular entity (“Cingular”), and assumed (apparently based on Cingular’s assertion that it “typically” entered into agreements with “reciprocal roaming rates,” which the Commission equated with symmetrical rates) that any anticompetitive behavior on the part of Cingular would result in retaliation by its roaming partners.⁴⁷ Under this theory, if Cingular attempted to raise its roaming charges, its roaming partners would do the same, and Cingular customers would switch to other carriers. The FCC also stated in the *AT&T Wireless/Cingular Order* that “competition and the need to generate revenues prevent nationwide carriers from refusing to enter into roaming agreements with smaller

⁴⁷ See *AT&T Wireless/Cingular Order* at 21587. Note that a “reciprocal” roaming agreement is one in which each carrier’s customers has the right to roam on the other carrier’s network; a “symmetrical” agreement is one in which the carriers pay each other the same rates for roaming. See Comments of Verizon Wireless at 6. We assume that in the *AT&T Wireless/Cingular Order*, the FCC was referring to agreements that were both reciprocal and symmetrical.

local and regional carriers or raising the roaming rates they charge other carriers above competitive levels.”⁴⁸

The reasoning that underlies the brief analysis of roaming in the *AT&T Wireless/Cingular Order* suffers from at least four fatal flaws. First, the Commission assumed that Cingular’s roaming agreements with its roaming partners were and would remain symmetrical. Notably, the notion espoused in the *AT&T Wireless/Cingular Order* – that an increase by Cingular in its roaming charges would result in a mass exodus of Cingular customers to other carriers – is true only to the extent that Cingular would accept a corresponding rate increase from its roaming partners. However, nothing in the record compiled in this proceeding suggests that this would be the case.⁴⁹

Second, the Commission’s apparent belief that Cingular’s roaming rates would remain symmetrical assumes that Cingular and its roaming partners have roughly equal bargaining power. Otherwise, there is no reason to assume that these rates will stay symmetrical, if indeed they are symmetrical today. The assumption of an equality of bargaining power does not reflect marketplace realities as experienced by MetroPCS and other regional carriers.⁵⁰ In the real world, if Cingular demanded a roaming agreement in

⁴⁸ *AT&T Wireless/Cingular Order* at 21591.

⁴⁹ The suggestion that customers will change carriers in response to an increase in roaming rates also ignores the fact that many customers are locked into long-term service contracts with substantial early termination penalties.

⁵⁰ Larger carriers may attempt to rationalize this inequality of bargaining power by claims that the larger carrier is giving the smaller carrier access to a greater coverage area or better markets. These claims, however, miss the point. If a carrier offers carrier A all of its markets for rate X, another carrier B seeking access to the same markets should only be required to pay the same rate X, not some multiple of rate X, assuming the cost to provide service by such carrier is the same between carrier A and B.

which it paid much lower rates than it received, a smaller carrier might well conclude that it had no viable alternative but to accept such an agreement. The perverse result of such action would be the opposite of the result envisioned by the FCC—*i.e.*, the customers of the smaller carrier would likely switch to Cingular or another large carrier with sufficient bargaining power to extract higher roaming rates from a roaming partner than the rates it pays.⁵¹ The *Rosston Analysis* implicitly acknowledges this difference in bargaining power, and argues that asymmetric deals “are entirely consistent with the operations of a competitive market.” Significantly, the fact that national carriers acknowledge the prevalence of asymmetric deals thoroughly undercuts one of the fundamental assumptions of the roaming analysis in the *AT&T Wireless/Cingular Order*.

Third, even if the Commission accepts the unsupported assumption that roaming rates between Cingular and its roaming partners will remain symmetrical, it does not necessarily follow that a symmetrical price increase will have the same effect on the customers of an independent carrier as on those served by a national carrier. The customers of a national carrier can be seen as paying at least a small premium to use a nationwide network, and they may therefore be somewhat less sensitive to price if they highly value the ability to use their handsets anywhere they choose. On the other hand, many regional carriers such as MetroPCS serve market segments that are historically underserved by the large national carriers, *e.g.*, individuals with lower incomes and/or less than perfect credit histories. Such customers are extremely sensitive to price, and an

⁵¹ This is particularly true with respect to mergers and auctions in that the larger carriers may acquire spectrum that would allow the larger carriers to overbuild and take away the smaller carrier’s customers.

increase in their service charges based on increased roaming costs can be expected to cause them to switch to other carriers to a greater extent than would customers of the national carriers or forego service entirely.⁵²

Fourth, the *Rosston Analysis* misses the mark because, as a result of the merger, Cingular enjoys an expanded coverage footprint that allows it to completely ignore many rural carriers with which it previously had incentives to establish roaming agreements. When a carrier does not serve an area, and has no possibility of doing so because it does not have a license, it has greater incentives to enter into roaming agreements with other carriers. However, as consolidation has occurred and auctions for new spectrum have concluded, the need for roaming by the national carriers has decreased and, thus, they no longer can be expected to reach roaming agreements, let alone symmetrical ones, with other carriers—especially as they overbuild such carriers.⁵³

In addition to the flawed reliance of the *Rosston Analysis* on the *AT&T Wireless/Cingular Order*, it also is erroneous for Rosston to assume that the analysis in the *AT&T Wireless/Cingular Order* may be accurately applied to the overall market for CMRS roaming services. In particular, many comments indicate that the reciprocal/symmetrical agreements referenced in the *AT&T Wireless/Cingular Order* are not

⁵² This would clearly fly in the face of the Commission's goal to have universal service—especially since many of MetroPCS' customers use their service as their primary, if not, sole telecommunications service.

⁵³ In fact, this is the kind of situation faced by the regional carriers, such as MetroPCS and Leap, where they serve the same markets as the large national carriers. As the national carriers overbuild the rural carriers, the Commission should expect the national carriers to refuse to enter into the same roaming agreements they previously had with such rural carriers.

prevalent, which means that the scenario of a national carrier driving its own customers away by raising roaming rates is inconsistent with marketplace realities.⁵⁴

Moreover, it would be grossly inaccurate to generalize to the entire CMRS roaming market the Commission's statement in the *AT&T Wireless/Cingular Order* that "competition and the need to generate revenues prevent nationwide carriers from refusing to enter into roaming agreements with smaller local and regional carriers or raising the roaming rates they charge other carriers above competitive levels."⁵⁵ Indeed, the record plainly demonstrates that the desire to harm smaller competitors has caused national carriers to engage in precisely the sorts of behavior that the Commission blithely assumed would never happen.⁵⁶

2. *The Wholesale Roaming Market Is Not Fully Competitive*

The record in this proceeding demonstrates that the CMRS roaming market is not competitive.⁵⁷ The national carriers have not provided *facts* that show the market is

⁵⁴ As carriers have increased their coverage, the analysis used by the FCC is less appropriate because the large carrier will in fact not be driving away customers to the extent it can provide service on its own network. Rather, it may be driving customers to its network through the exercise of its market power.

⁵⁵ This would only be true if the national carrier believed it could derive more revenue from keeping its roaming rates low and its roaming minutes high than from driving up the prices of competitors and driving the customers of those competitors onto its network.

⁵⁶ *See, e.g.*, SouthernLINC Comments at 12 (describing refusal of Nextel Partners to enter into a roaming agreement with SouthernLINC Wireless). The *Rosston Analysis* is also flawed since it does not appear that he reviewed *any* roaming agreements and bases his arguments solely on economic theories. Based on the current record, regardless of economic theory, the national carriers *are able* to seek and obtain supra-competitive rates for roaming. *See* Leap Comments at 13-14. Moreover, contrary to the national carriers' claims that allowing access to greater territory might justify different rates, that does not change the costs of providing service *between* carriers. A difference in territory or number of customers should be addressed by the balance of traffic (and therefore payments) between the carriers, not by the rates charged.

⁵⁷ *See, e.g.*, Leap Comments at 13; SouthernLINC Comments at 33.

competitive, but rather have argued that the market for CMRS roaming is competitive, based almost entirely on the perceived level of competition in the CMRS *retail* market.⁵⁸ For example, T-Mobile cites only statistics relating to the *retail* market in support of its contention that the roaming market is competitive.⁵⁹ In essence, the conclusion of the national carriers that no automatic roaming rule is needed is based upon the faulty premise that the wholesale roaming market is the same as the CMRS retail market.

In contrast to the rosy portraits of competition in the CMRS *retail* market cited by the national carriers, the *McAfee Report* describes the market structure for *wholesale* CMRS roaming services. The *McAfee Report* finds that the vast majority of major markets have either a monopoly or duopoly in carriers using GSM or iDEN technology.⁶⁰ Even though the marketplace for CDMA is somewhat better, the *McAfee Report* nevertheless shows that nearly half (46%) of the 50 largest BTAs have a duopoly of CDMA-based carriers.⁶¹ In smaller markets, such as those where many independent

⁵⁸ See Comments of Cingular Wireless LLC at 10.

⁵⁹ See T-Mobile Comments at 5-6. T-Mobile states that the roaming market generated almost \$4.2 billion in revenues in 2004, but fails to explain how the size of the roaming market supports the argument that the roaming market is competitive. The most specific example that T-Mobile cites in support of this argument is the FCC's statement in the Sprint-Nextel merger that the merger of these entities would not reduce the number of iDEN or CDMA roaming partners. T-Mobile Comments at 5, note 14. However, the FCC was simply observing that the merger of an iDEN-based CMRS operator to one using CDMA technology would not reduce the number of roaming partners for either technology so long as each technology continued to be used in the network of the combined carriers. It is a gross overstatement to equate the FCC's factual observation to a statement that the roaming market is competitive. See also Verizon Wireless Comments at 7, 12 (arguing that "there is no failure in the CMRS roaming market" and that "industry consolidation has not significantly affected the availability of roaming partners"; this begs the question of whether the CMRS roaming market was competitive *before* the most recent wave of CMRS mergers).

⁶⁰ *McAfee Report* at 11.

⁶¹ *Id.*

CMRS providers operate, the percentage of markets with CDMA monopolies or duopolies is even greater. The *McAfee Report* confirms the experience of MetroPCS and other regional carriers that there is not effective competition in the market for wholesale CMRS roaming services.⁶²

The national carriers' assertions concerning the competitiveness of the retail CMRS market also are overstated. In the *Tenth CMRS Competition Report*, the Commission found (as noted by Cingular) that no CMRS provider has a dominant share of the retail market, and that this market "continues to behave and perform in a competitive manner."⁶³ However, Cingular and the other national carriers refuse to focus on one very troubling finding in the *Tenth CMRS Competition Report*: the average Herfindahl-Hirschman Index ("HHI") for each Economic Area in the United States (weighted by population) is 2450 for the CMRS retail market. According to the *DOJ-FTC Guidelines*, a market with an HHI of 1800 or above is considered "highly concentrated."⁶⁴ And, the HHI numbers would be dramatically worse if the GSM and CDMA segments were analyzed as separate relevant markets. Clearly, even at the retail

⁶² If a carrier has a duopoly in one market, it can use that market power to increase its market power in markets where it does not have a duopoly by refusing to give lower prices in the more competitive market.

⁶³ See Comments of Cingular Wireless at 11 (quoting *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 05-71, 20 FCC Rcd 15908, Tenth Report (2005) (the "Tenth CMRS Competition Report").

⁶⁴ *DOJ/FTC Guidelines* at Section 1.5.

level, the CMRS market is highly concentrated and not the model of perfect competition imagined by the national carriers.⁶⁵

3. *The Lack of Competition in the Wholesale Roaming Market Will Harm Consumers Unless the Commission Adopts an Automatic Roaming Rule*

The *Rosston Analysis* states that “[a]ny analysis of a roaming rule should focus on consumers.” MetroPCS agrees that the Commission should focus on the potential effects on consumers of the current lack of an automatic roaming requirement. However, for the reasons described above, such a focus on *effects* of an automatic roaming rule or lack thereof should not be confused with an *a priori* determination that the retail market is the relevant product market.⁶⁶ Importantly, the absence of an automatic roaming rule is detrimental to the customers of MetroPCS, other independent CMRS carriers, and potential new entrants into the wireless marketplace (*e.g.*, designated entities, existing carriers that do not have roaming agreements but may seek to expand geographically, as well as completely new entrants to the wireless industry).

As explained in the comments filed by MetroPCS, the majority of MetroPCS customers historically have opted for a simple, flat-rate plan that includes only service in a subscriber’s home market. These customers have found that the innovative, low-cost, flexible plans offered by MetroPCS serve the needs of individuals with poor or no credit

⁶⁵ Of course, the best indication that a market is not competitive is whether a supplier is able to extract monopoly rents. Here, as Leap Wireless points out in its comments at 13, the national carriers are charging roaming rates to Leap far in excess of their own retail rates for similar service and in excess of what they charge other carriers.

⁶⁶ For example, if a supplier of raw materials has a monopoly, no economist would agree that the raw materials market was competitive merely because there may be a significant number of competitors providing finished products to a competitive retail market.

histories better than the plans offered by the national carriers.⁶⁷ However, as some MetroPCS customers have sought the ability to roam outside their home markets, MetroPCS has pursued roaming agreements with technologically-compatible national carriers. Unfortunately, the rates that MetroPCS has had to pay in order to provide its customers with any ability to roam has given its customers three alternatives, all of which are detrimental to such customers: (1) forego roaming altogether due to the high cost; (2) pay above-market rates in order to keep a local service that otherwise meets their needs; or (3) obtain service from a national carrier—which may not meet the customers’ needs with respect to local service—if they are able to meet the national carrier’s credit criteria.⁶⁸

The national carriers argue in their comments that the Commission must “focus on consumers, not private carriers.”⁶⁹ MetroPCS agrees that the Commission should protect the welfare of consumers. However, contrary to the suggestion of some national carriers, consumers benefit by Commission policies that enable strong, regional wireless service providers to offer innovative services that are competitive with those offered by the national carriers. This conclusion is supported by the Congressional mandates that

⁶⁷ Indeed, it appears that the services being offered by the regional carriers are having an impact on the national carriers by forcing them to increase the number of minutes in the monthly buckets in their rate plans. The real reason that the national carriers oppose making automatic roaming available to the smaller regional carriers is that they want to frustrate the ability of regional carriers to compete with them and to cause them to have to lower rates. This is *not* a legitimate reason to unjustly or unreasonably discriminate against the smaller regional carriers.

⁶⁸ This third reason is exactly why the FCC must establish roaming rules. The national carriers, if successful, will have an effect on whether underserved segments of the market will have access to wireless services just like other segments of the population.

⁶⁹ See Cingular Comments at 21 (internal citations omitted).

give small business, rural telephone companies, and other designated entities (“DEs”) “the opportunity to participate in the provision of spectrum-based services.”⁷⁰ Not surprisingly, the carriers fostered by this DE program tend to be smaller local and regional carriers. For these designated entities to have a meaningful opportunity, the Commission must ensure that these carriers enjoy and maintain the ability to provide roaming services to their customers at reasonable prices.⁷¹ This is not only in the interest of the regional carriers, but, more importantly, is in the interest of all consumers.⁷² After all, the core objective of the Communications Act is to foster an efficient and “Nation-wide” telecommunications system.⁷³

B. The Commission Must, at a Minimum, Investigate Behavior of National Carriers in the Roaming Market Pursuant to its Jurisdiction Under Section 403 of the Act and Take Action in Cases of Unreasonable or Discriminatory Pricing

The four national carriers describe a perfectly competitive wholesale roaming market where the large carriers do not engage in anticompetitive or discriminatory conduct. This view of the market simply cannot be reconciled with the experiences cited

⁷⁰ See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 31 (1993).

⁷¹ As the Commission prepares for the Advanced Wireless Services auction, it must take into account that unless bidders on spectrum are given an opportunity to roam, their participation in the auction may be limited. The only way designated entities can meaningfully compete for spectrum in the upcoming auctions is if they have a meaningful ability to roam.

⁷² To a large extent, denying roaming services by pricing roaming services at supra-competitive rates will harm all consumers by limiting their choices solely to the national carriers. Since one of the main reasons for fostering small business participation was to encourage innovation, denying these new innovators the ability to compete will deny their ability to effect changes in the wireless market. Further, not only will the customers of the regional carriers be harmed, but so will those of the national carriers because once the national carriers can deny services to the regional carriers to stymie their ability to effectively compete, the national carriers have no incentive to reduce their own retail prices to their customers.

⁷³ See 47 U.S.C. § 151.

by the smaller regional and local carriers. It would be contrary to the public interest for the Commission to respond to these divergent viewpoints by arbitrarily siding with the small number of national carriers that say there is no problem, and allowing them to benefit from their self-serving comments and economic analysis. It would also be wrong and contrary to the interests of consumers for the Commission once again to forego ruling in this important area simply because there is conflicting evidence and the record is not clear.

1. An Investigation by the Commission Would Be the Most Effective Way in Which to Investigate the Allegations Raised in This Proceeding Concerning Unreasonable Charges and Discrimination

The information the Commission needs to ascertain the true nature of the roaming market is out there, it just isn't being volunteered by the industry participants and, in some instances, it cannot be. Many carriers are prohibited from providing in a public proceeding concrete details of their roaming arrangements because their roaming arrangements with other carriers are subject to nondisclosure agreements, and voluntarily disclosing information pertaining to these dealings could subject the reporting carriers to substantial legal liability.⁷⁴ In other instances, information is withheld out of fear. Based on past experience, independent carriers have a legitimate and well-founded fear of

⁷⁴ Disclosing information that is subject to a contractual confidentiality provision could expose the disclosing party to liability *even if the disclosed information is not truly competitively sensitive*. This is an important point because, in the experience of MetroPCS, it is the larger national carriers who use their superior bargaining position to insist on inclusion of confidentiality clauses in roaming agreements. The Commission must be concerned that the motivation behind these clauses is to conceal discriminatory or anticompetitive practices, and not to protect competitively-sensitive information.

retaliation from the national carriers.⁷⁵ Similarly, it is unrealistic to expect that the national carriers will voluntarily disclose details of their agreements with smaller carriers, not only because of the confidentiality restrictions cited above, but also because the agreements may well demonstrate that discriminatory, anti-competitive behavior is rampant on the part of at least some, if not all, of the national carriers.

The Commission should reject claims that roaming agreements should not be provided because they are competitively sensitive and confidential by nature. The Commission already found, correctly, that roaming is a common carrier service. Common carrier services must be offered on a non-discriminatory basis. Since contracts substitute for tariffs, allowing agreements to remain confidential is tantamount to allowing secret tariffs – something the Commission has never approved for common carrier services. Any claim for confidential treatment would, by its nature, indicate that some carriers are getting special preferential rates that are not generally available to others. The Commission should not be sanguine about such a claim.⁷⁶

⁷⁵ In addition, absent a rule allowing all carriers to have access to all agreements, a voluntary disclosure of rates by one carrier could disadvantage that carrier in negotiations with another carrier because the disclosing party will have given up relevant pricing information without receiving the comparable information in return.

⁷⁶ Although MetroPCS believes it is inappropriate for there to be confidential common carrier contracts, if the Commission wants to maintain the confidential nature of these agreements during the pendency of these proceedings, it could require each carrier to file its agreements under a protective order that would allow the Commission staff, or an outside consultant hired by the FCC, to evaluate the claims being made by the various parties. MetroPCS is confident that once all of the agreements are reviewed, the Commission will conclude that unjust and unreasonable discrimination is occurring.

The Commission has broad authority under Section 403 of the Act to initiate investigations of anticompetitive or discriminatory conduct, as well as other violations of the Act or the FCC's rules.⁷⁷ Such an investigation would allow the Commission ample opportunity to obtain all relevant information and make an informed decision, while still protecting the interests of large and small carriers alike (and, by extension, their customers). An investigation would be preferable to a Section 208 proceeding because, as noted by MetroPCS and other commenting parties, independent carriers frequently do not have either access to the information needed to make a *prima facie* claim of discrimination or the resources to pursue such a claim against a much larger, better-funded adversary.

To the extent that the Commission were to find that a thorough review of roaming agreements would be beneficial in reconciling the divergent worldviews presented in this proceeding, precedent exists for retaining an independent third party to conduct such a review.⁷⁸ In light of the importance of roaming services to the economy in general, and individual consumers in particular, MetroPCS recommends that the FCC pursue this alternative to supplement the internal resources it has available to devote to such a project.

⁷⁷ 47 U.S.C. § 403.

⁷⁸ See, e.g., "A Report on Technical and Operational Issues Impacting The Provision of Wireless Enhanced 911 Services," prepared for the FCC by Dale N. Hatfield, Telecommunications Consultant (rel. Oct. 15, 2002).

2. *To the Extent That the FCC Finds Unjust or Unreasonable Charges or Discrimination in the CMRS Roaming Market, It Must Take Steps to Abolish Such Practices*

The idea that roaming agreements should not be unreasonably discriminatory did not engender a great deal of controversy among the commenting parties.⁷⁹ For example, T-Mobile expressly acknowledges that Section 202's non-discrimination requirement applies to roaming services.⁸⁰ Consequently, MetroPCS urges the Commission to, at a minimum, clarify that charging different roaming rates to different carriers constitutes unlawful discrimination under Section 202 of the Act unless the providing carrier can demonstrate that the cost to provide service to each carrier is different.

One commenting party argues that the adoption of an “anti-discrimination rule” would be “unprecedented and wholly unjustified, in both law and economic policy.”⁸¹ This claim is tantamount to a concession that discrimination is indeed occurring. The fact that discrimination is occurring should concern the Commission in light of the explicit requirements of Section 202 of the Communications Act, which renders it unlawful for any common carrier to make any unjust or unreasonable discrimination in

⁷⁹ See, e.g., USCC Comments at 8 (arguing that the FCC should “make clear that a refusal to [enter into an automatic roaming agreement with a small, mid-sized, or regional carrier on reasonable terms and conditions] would be treated as an unjust, unreasonable, and discriminatory practice under Sections 201 and 202 of the Communications Act . . .”).

⁸⁰ See T-Mobile Comments at 11.

⁸¹ Sprint Nextel Comments at 17.

charges, practices, classifications, regulations, facilities or services for or in connection with like communications service.⁸²

As described in the *ERS Report*, the national carriers can and do discriminate against unaffiliated carriers.⁸³ The *ERS Report* observes that Mobile Virtual Network Operators (“MVNOs”) are estimated to pay national carriers between \$0.04 and \$0.08 per minute.⁸⁴ In contrast, Leap Wireless reportedly pays large carriers an average of \$0.28 per minute. And, contrary to the volume discounts that are common in the MVNO market, Leap reports that the rates Leap pays to one large carrier actually *increase* with volume.⁸⁵ Similarly, SouthernLINC Wireless reports that it has been unable to obtain any roaming agreement with Nextel Partners and that it has only a “limited, non-reciprocal arrangement with Sprint Nextel itself, for which SouthernLINC Wireless must pay rates that substantially exceed those typical in the industry.”⁸⁶ There is no readily apparent justification for differences of this nature in the context of a non-discriminatory common carrier service. Discriminatory conduct of this nature underscores the need for prompt and effective Commission action.

⁸² 47 U.S.C. § 202(a). The key is whether the services being offered are the same and then whether the rates are the same. The fact that some carriers may have a greater number of customers or coverage should not affect the analysis.

⁸³ *ERS Report* at 10-13.

⁸⁴ *Id.* at 11.

⁸⁵ *Id.*

⁸⁶ Comments of SouthernLINC Wireless at 3.

While MetroPCS acknowledges that the Commission would be justifiably reluctant to adjudicate every potential instance of alleged overcharging in the roaming context, it also submits that the adoption of certain requirements concerning pricing would assist carriers in resolving disputes themselves with minimal FCC involvement. Of course, the overarching legal standard that governs the price and terms of roaming services is that such prices and terms must be “just and reasonable.” While it is at least theoretically possible that different rates could be “just and reasonable” under different circumstances, the Commission should adopt a maximum presumptive price that would be deemed *per se* unreasonable absent a showing by the carrier offering such price that it would cost more to serve a given customer. For example, the Commission should adopt a presumption that any roaming rate in excess of a carrier’s best retail rate is presumed unreasonable unless cost-justified by the carrier imposing such rate. Such a presumption would set only an outside limit for roaming charges – i.e., a “default rate” – and would not foreclose the possibility that a rate below this limit could be mandated upon a proper showing under Section 201.⁸⁷ Similarly, a carrier defending such a price would have the opportunity to rebut this presumption by showing that its cost of providing service to a particular carrier exceeds its best retail rate.

⁸⁷ This would also have the effect of essentially allowing competing carriers to purchase roaming services at retail rates.

3. *The Commission Has Clear Authority to Require That Competitors Deal With One Another With Respect to the Provision of Common Carrier Services*

Most of the commenting parties acknowledge, at least implicitly, the authority of the Commission to implement an automatic roaming rule if it finds that doing so is in the public interest. However, one party suggests that the Commission has no authority to adopt a rule that could be construed as requiring “competitors to assist each other,” even going so far as to say that “there is no basis in law or policy” for such a rule.⁸⁸ While it may be true as a general proposition of corporate law that competitors have no inherent duty to assist each other, such parties disregard the fact that common carrier regulation is unique and does, in fact, sometimes require competitors to “assist each other” in terms of making their networks available to the customers of their competitors, especially where one carrier has significant market power.⁸⁹ For example, more than 35 years ago, in the *MCI Decision*, the Commission encountered similar intransigence from the pre-breakup AT&T in its refusal to provide interconnection (*i.e.*, “assist” its competitor). In that case, the Commission held that “absent a significant showing that interconnection is not technically feasible, the issuance of an order requiring the existing carriers to provide loop service is in the public interest.”⁹⁰

⁸⁸ See Sprint Nextel Comments at 17.

⁸⁹ Given that in many instances a monopoly or duopoly market exists for roaming service using a given technology, the national carriers clearly have significant market power.

⁹⁰ *Microwave Communications, Inc.*, Docket No. 16509, Decision, 18 F.C.C.2d 953, para. 36 (1969). Indeed the telecommunications market has historically required carriers to interconnect their networks and to provide services to other carriers when the services offered are common carrier services—*e.g.*, required resale policies.

The Commission previously has concluded that “roaming is a common carrier service and that CMRS providers are subject to the common carrier provisions of Title II of the Act.”⁹¹ Moreover, the Act defines “telecommunications service” (which can be considered synonymous with the term “common carrier service”⁹²) 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.”⁹³ As wholesale automatic roaming services are made available “to such classes of users as to be effectively available directly to the public,” *i.e.*, CMRS operators that resell such services, the imposition of common carrier regulation on automatic roaming services provided on a wholesale basis would be consistent with both Commission precedent and the Act.

IV. THE COMMISSION MUST STRENGTHEN ITS SECTION 208 PROCESS WITH RESPECT TO AUTOMATIC ROAMING SERVICES AND REQUIRE THAT ROAMING AGREEMENTS BE MADE PUBLICLY AVAILABLE

As MetroPCS noted in its comments in this proceeding, the current Section 208 process is an inadequate remedy for smaller regional and local carriers to vindicate their roaming rights for a variety of reasons. Chief among these is the absence of publicly-available information that will allow a competitive carrier to establish a *prima facie* case that the large national carriers have engaged in widespread discrimination and

⁹¹ *NPRM*, at para. 2.

⁹² *See* Joint Explanatory Statement of the Committee of Conference, 104 H. Rpt. 458.

⁹³ 47 U.S.C. § 153 (46) (emphasis added).

unreasonable charges for roaming in violation of Sections 201 and 202 of the Act. MetroPCS, therefore, urges the Commission, at a minimum, to require that roaming agreements be made publicly available in order to give independent CMRS providers the opportunity to make informed decisions regarding the merits of their complaints before embarking on a potentially expensive and time-consuming process.⁹⁴

Another significant barrier that deters independent CMRS operators such as MetroPCS from pursuing Section 208 complaints against large carriers is the ambiguous legal environment created by prior – and often inconsistent – Commission pronouncements on the subject. For example, as noted above, the Commission previously has found “roaming” to be a common carrier service, with no distinction between automatic and manual roaming made for purposes of this classification. Similarly, in the *NPRM* the FCC seeks comment on the adequacy of existing remedies under Sections 201, 202, 208, 251, and 332 of the Act, which are available only if automatic roaming is a common carrier service.⁹⁵ However, it is difficult to reconcile the Commission’s previous decision not to impose an automatic roaming requirement with the above precedent or with the requirement of Section 201(a) that a common carrier

⁹⁴ Making these agreements available would give carriers the information needed to pursue a complaint, if justified, but also would give the national carriers increased incentives to reach voluntary agreements rather than face a meritorious complaint. As a consequence, MetroPCS submits that having this information available would engender voluntary agreements and not open a floodgate of litigation. A simple reality is that smaller regional and local carriers have neither the desire nor the financial resources to litigate endlessly with large carriers, which have far greater resources.

⁹⁵ *NPRM* at para. 34.

service be provided upon reasonable request therefor.⁹⁶ The FCC should therefore clarify that automatic roaming is, indeed, a common carrier service, and is subject to all common carrier requirements of Title II of the Act.

In addition to adopting a requirement that automatic roaming agreements be made publicly available and clarifying that roaming is a common carrier service that must be made available at reasonable and non-discriminatory prices upon reasonable request therefor, the Commission also should strengthen the Section 208 process by adopting a statement of presumptions such as those enunciated in the comments filed by MetroPCS. Those presumptions are as follows:

- A carrier is obligated to provide service upon reasonable request *unless* the provision of service “is not technically feasible or economically reasonable.”⁹⁷
- The provision of roaming services is 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.”⁹⁸

The provision of roaming services of a particular nature (*e.g.*, automatic

⁹⁶ The decision not to require automatic roaming creates the anomalous situation that a smaller carrier could demonstrate in a particular case that automatic roaming is economically and technically feasible and yet not prevail in a Section 208 complaint proceeding.

⁹⁷ *Cf.* 47 C.F.R. § 20.11(a).

⁹⁸ *Cf.* 47 C.F.R § 51.5 (Definition of “Technically feasible”).

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).⁹⁹

- 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.”¹⁰⁰
- 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.¹⁰¹

The adoption by the Commission of the above presumptions and a requirement that roaming agreements be made publicly available could be expected to have the same mid- to long-term effect as the current interconnection regime. In other words, while there could be some litigation to “test the waters” upon adoption of such rules, carriers would soon reach an equilibrium in which small and independent CMRS operators could readily obtain roaming services upon reasonable request, and at reasonable and non-

⁹⁹ Cf. 47 C.F.R. §§ 51.305(c) and (d), 311(c) and (d) and 321 (c).

¹⁰⁰ *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).

¹⁰¹ Cf. 47 C.F.R §§ 51.313 and 64.2321.

discriminatory rates.¹⁰² Such rules would be fully consistent with prior FCC precedent finding roaming to be a common carrier service, and with Title II of the Act. Such rules would enhance the level of competition in the CMRS retail market by giving regional carriers such as MetroPCS an even playing field in the wholesale CMRS roaming market. Most importantly, full competition at all levels of the CMRS market would serve the public interest by promoting the widespread availability of innovative and affordable wireless services to *all* geographic areas and demographic segments.

V. 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 the comments filed by MetroPCS and other commenting parties.

¹⁰² This is the pattern that unfolded in the context of interconnection agreements after the adoption of the Telecommunications Act of 1996 and the implementing regulations respecting interconnection agreements. After the early test cases, carriers came to understand their respective interconnection rights, and interconnection rates became more standardized, and now interconnection complaints are the exception and not the rule.

Respectfully submitted,

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