

**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
)
)
)

**PETITION FOR RECONSIDERATION
OF
METROPCS COMMUNICATIONS, INC.**

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Summary

MetroPCS Communications, Inc. (“MetroPCS”) respectfully requests that the Commission reconsider certain aspects of its *Report and Order* pertaining to automatic roaming services. Specifically, MetroPCS is petitioning the Commission to remove or revise the exclusion of in-market or home roaming from the commercial mobile radio service carrier’s automatic roaming service obligation. Reconsideration of this exclusion is merited on multiple grounds. First, having decided that automatic roaming service is a common carrier service, the Commission cannot exclude in-market roaming absent an adequate justification. The suggestion that an in-market roaming request is *per se* unreasonable is incorrect and legally unsustainable. And, the desire of the Commission to promote facility-based competition, standing alone, is not adequate to permit the Commission to ignore other important mandates found in the Communications Act.

Second, the *Report and Order* contains a flawed public interest analysis. The home roaming exclusion will harm consumers, reduce competition, and undermine the Commission’s objective to protect life and promote public safety. The in-market roaming restriction will be difficult if not impossible to implement given the number of different wireless service areas and service variations that exist in the market.

Third, the home roaming exclusion will foster unreasonable discrimination by enabling incumbents with market power to disadvantage new entrants and disruptive competitors. Based upon these factors, reconsideration is justified in the public interest and under the applicable legal standard.

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PETITION FOR RECONSIDERATION OF METROPCS COMMUNICATIONS, INC.

MetroPCS Communications, Inc. (“MetroPCS”),¹ by its attorneys and pursuant to Section 1.429(a) of the Commission’s Rules,² hereby respectfully requests that the Commission reconsider certain aspects of its *Report and Order*, FCC 07-143, released August 16, 2007, in the above-captioned proceeding (the “*Roaming Order*”).³ The following is respectfully shown:

I. INTRODUCTION

In the *Roaming Order*, the Commission held that automatic roaming is a common carrier obligation and ruled that commercial mobile radio service (“CMRS”) carriers are required to provide automatic roaming services to other CMRS carriers upon reasonable request. The Commission determined that, when a reasonable request is made by a technologically compatible CMRS carrier (the “Requesting Carrier”), the facility-based carrier to which the request is

¹ For purposes of this Petition, the term “MetroPCS” refers to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

² 47 C.F.R. § 1.429(a).

³ See *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 07-143 (rel. Aug. 16, 2007) (the “*Roaming Order*”). This Petition is timely under Sections 1.4(b) and 1.429(d) of the FCC Rules. 47 C.F.R. §§ 1.4(b), 1.429(d).

directed (the “Host Carrier”)⁴ must provide automatic roaming services on a just, reasonable and non-discriminatory basis. However, this automatic roaming right is severely restricted in the case of “in-market roaming” or “home roaming” where the Requesting Carrier “holds a wireless license or spectrum usage rights (*e.g.*, spectrum leases) in the same geographic location as the would-be host CMRS carrier.”⁵ The Commission reasoned that mandating automatic in-market or home roaming would create disincentives for the Requesting Carrier to build out its own system in the overlapping market area and would, therefore, reduce facility-based competition.⁶ The Commission’s exclusion of home roaming from the automatic roaming requirement applies “regardless of whether the requesting carrier is providing no service, limited service, or state-of-the-art service.”⁷ And, there is no transition period. The in-market roaming exclusion in the *Roaming Order* is effective immediately, and the limitation applies regardless of whether the Requesting Carrier has held its license for the overlapping area long enough to build a competitive system.

II. THE LEGAL BASIS OF THIS PETITION

The Commission will entertain a petition for reconsideration if it is based on new evidence, changed circumstances, or if reconsideration is justified in the public interest.⁸

Reconsideration also is warranted “if the petitioner cites material errors of fact or law or presents new or previously unknown facts and circumstances which raise substantial or material questions

⁴ The following definition of “Host Carrier” has been added to Section 20.3 of the FCC Rules by the *Roaming Order*: “Host Carrier. For automatic roaming, the host carrier is the facilities-based CMRS carrier on whose system a subscriber roams when outside of its home carrier’s home market.”

⁵ *Roaming Order*, para. 48.

⁶ *Id.* at para. 49.

⁷ *Id.* at para. 50.

⁸ In the Matter of Numbering Resource Optimization, *Fourth Order on Reconsideration*, 22 FCC Rcd. 8047 at para. 5 (rel. Apr. 26, 2007); 47 C.F.R. § 1.429(b)(3).

of fact that were not considered and that otherwise warrant [the] review of [the] prior action.”⁹

In addition, the Administrative Procedures Act (“APA”) imposes on the Commission a “requirement of reasoned decision-making,”¹⁰ and an obligation to avoid agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹¹ If Congress has not dictated a particular outcome, the agency has been delegated authority and discretion to act, but the agency’s statutory interpretation must be reasonable.¹² As demonstrated in detail below, reconsideration of the in-market or home roaming restriction contained in the *Roaming Order* is justified under these standards.

MetroPCS is an “interested person” eligible to petition for reconsideration of the new automatic roaming requirements and, in particular, the in-market roaming restriction which is challenged herein.¹³ MetroPCS is a CMRS carrier and has been an active participant throughout these automatic roaming proceedings. MetroPCS is a party to a number of automatic roaming agreements that will be adversely affected by the *Roaming Order* (if not immediately, then at the time the agreements come up for renewal.) MetroPCS also has ongoing roaming discussions with other carriers which have not yet resulted in agreements and that will be affected by the *Roaming Order*. Most importantly, MetroPCS has some market overlaps with the Host Carriers with which it has entered into or is seeking roaming agreements, which means that the nature and scope of any restrictions on in-market or home roaming will have a direct adverse affect on

⁹ *Lancaster Communications, Inc.*, 22 FCC Rcd. 2438 at para. 20 (2007).

¹⁰ *Celcom Communications Corp. v. FCC*, 789 F.2d 67, 71 (D.C. Cir. 1986).

¹¹ 5 U.S.C. § 706(2)(A).

¹² *Am. Library Ass’n. v. FCC*, 406 F.3d 689, 698-99 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

¹³ 47 C.F.R. § 1.429(a).

MetroPCS.¹⁴ As a consequence, MetroPCS has standing to submit this petition for reconsideration.¹⁵

III. THE RESTRICTIONS ON IN-MARKET ROAMING CANNOT BE RECONCILED WITH THE FINDING THAT AUTOMATIC ROAMING IS A COMMON CARRIER SERVICE

The *Roaming Order* correctly concludes that roaming, both manual and automatic, satisfies all the statutory elements of “commercial mobile radio service,” as defined in Section 332(d)(1) of the Communications Act.¹⁶ And, the Commission properly finds that Section 332(c)(1)(A) of the Act requires that a person engaged in the provision of a commercial mobile service must be treated as a common carrier for purposes of the Communications Act.¹⁷ In addition, the *Roaming Order* appropriately holds that automatic roaming is a common carrier service, subject to the strictures of Sections 201 and 202 of the Communications Act, “because roaming capability gives end users access to a foreign network in order to communicate messages of their own choosing.”¹⁸ Because Sections 201 and 202 of the Act apply, a Host

¹⁴ As is discussed in greater detail within (*see p. 7 infra*), MetroPCS holds certain Advanced Wireless Services (“AWS”) licenses which are subject to spectrum clearing requirements before the spectrum can be used by MetroPCS or its customers. Because of the manner in which the Commission has formulated the in-market roaming exclusion, MetroPCS customers are effectively precluded from enjoying roaming rights in any AWS market where MetroPCS will be a new entrant even though MetroPCS has not been given a fair opportunity to initiate its own service on the encumbered spectrum in these markets and MetroPCS was not given notice of this limitation prior to the commencement of Auction 66.

¹⁵ 47 C.F.R. § 1.106(b)(1) (stating that any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission ... may file a petition requesting reconsideration of the action taken).

¹⁶ 47 U.S.C. § 332(d)(1); *Roaming Order*, para. 25; *See also* In the Matter of 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, 9469 at para. 10 n.30 (1996) (“*Interconnection and Resale Obligations Second Report and Order*”). Specifically, a “commercial mobile service” is defined in Section 332(d)(1) of the Communications Act as “any mobile service that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public...”

¹⁷ 47 U.S.C. § 332(c)(1)(A).

¹⁸ *Roaming Order*, paras. 23, 25; *See also Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd. 9462, 9469 at para. 10.

Carrier has a “duty” to honor reasonable requests for automatic roaming service,¹⁹ an obligation to provide such services on “just and reasonable terms,²⁰ and is prohibited from engaging in “unjust or unreasonable discrimination.”²¹

Having properly concluded that automatic roaming is a common carrier service, it is incumbent on the Commission to provide a legally sustainable rationale for allowing a Host Carrier to deny a request for in-market or home roaming rights. The *Roaming Order* fails to do so. The discussion of the in-market/home roaming restriction is found at paragraphs 46 through 51 of the *Roaming Order*. These paragraphs indicate that Host Carriers are not obligated to provide in-market roaming, and allude to the Commission’s concern that allowing home market roaming will deter increases in facility-based competition, but contain no cogent legal analysis explaining why the provision of automatic in-market roaming is not mandated by the Host Carrier’s common carrier obligation. Indeed, as shown below, the prohibition on in-market roaming creates significant barriers to entry and deters the very facilities-based competition sought by the Commission.

As earlier noted, the Commission concluded that both manual and automatic roaming are common carrier services, “because both forms of roaming capability give end users access to a foreign network in order to communicate messages of their own choosing.”²² Of course, in-market automatic roaming also provides the public with “access to a foreign network in order to communicate messages of their own choosing.” So, from the end-user’s point of view, there is absolutely no difference between in-market and out-of-market roaming. This being the case, the

¹⁹ 47 U.S.C. § 201(a).

²⁰ 47 U.S.C. § 201(b).

²¹ 47 U.S.C. § 202(a).

²² *Roaming Order*, para. 23.

Commission needs to explain why the common carrier obligations of a Host Carrier seem to evaporate simply because the Requesting Carrier happens to hold license rights for an area where roaming services are sought.

The *Roaming Order* does contain a brief discussion of the “Reasonableness of Automatic Roaming Requests,” and adopts a rebuttable presumption that requests “for areas outside of the requesting CMRS carrier’s home market” are reasonable.²³ This ruling appears to imply that a roaming request for an area inside the Requesting Carrier’s home market is deemed by the Commission to be inherently unreasonable. MetroPCS is willing to concede that a carrier’s common carrier obligations do not require it to satisfy an inherently unreasonable request. However, as is discussed in detail below, the Commission cannot possibly sustain the position that in-market roaming requests are *per se* unreasonable.

A. The *Roaming Order* Contains Language Demonstrating That In-Market Roaming Arrangements are Reasonable

The *Roaming Order* expressly indicates that a Host Carrier and a Requesting Carrier are not prohibited from entering into an in-market roaming agreement if they choose to do so, noting that “[w]e continue to encourage all CMRS carriers to negotiate desired terms and conditions of automatic roaming, *including automatic roaming in overlapping geographic areas.*”²⁴ Having thus expressly decided to permit and encourage home roaming arrangements, the Commission cannot succeed in arguing that all requests for such an arrangement are inherently unreasonable. This point is reinforced by the fact that there are some in-market roaming agreements in effect today as a result of voluntary negotiations. The existence of these agreements provides compelling market-based evidence that such arrangements are not

²³ *Id.* at para. 31.

²⁴ *Id.* at para. 49 (emphasis added).

unreasonable *per se*. The simple fact is that commercial parties, negotiating in good faith and at arms length, do not generally enter into inherently unreasonable relationships.

B. There are Many Instances in Which In-Market Roaming Requests are Reasonable, Justified and Pro-Competitive

The *Roaming Order* expresses concern that a Requesting Carrier may elect to roam on a Host Carrier's system rather than becoming a facility-based competitor. This narrow view fails to recognize that there are innumerable pro-competitive reasons why a Requesting Carrier might seek roaming rights in a home market where it holds or has access to spectrum. For example:

- An applicant who acquires spectrum in a spectrum auction may face significant impediments to immediate use of the spectrum, including spectrum clearing and incumbent relocation requirements that effectively prevent the initiation of service for extended periods of time. For example, the Advanced Wireless Services ("AWS") spectrum that was licensed in Auction 66 is encumbered by pre-existing government users, some of which have indicated that it will take several years for them to relocate.²⁵ This is exactly the situation that MetroPCS faces in certain AWS markets it acquired. There is nothing MetroPCS would like to do more than initiate facility-based service in these markets, but it is unable to do so due to the existing encumbrances on the spectrum. The situation in AWS is not unique. In Auction 73, high bidders will have to wait until the DTV transition date - - currently set at February 2009 - - before having access to the 700 MHz spectrum.²⁶ Further, the additional AWS spectrum in the 2155-2175 MHz

²⁵ See Office of Management and Budget *Report to Congress on Agency Plans for Spectrum Relocation Funds Under the Commercial Spectrum Enhancement Act* (Feb. 16, 2007). This report projects timelines of up to 72 months to relocate some government users from AWS spectrum.

²⁶ See *In the Matter of Services Rules for the 698-746, 747-762 and 777-792 MHz Bands, Second Report and Order*, 22 FCC Rcd. 15289, para. 15 (2007) (the "700 MHz Order").

band that is soon to be licensed also has a number of incumbents who have to be cleared.²⁷

- A new entrant to a market who is aggressively building out a system often will not want to initiate commercial service until the coverage is sufficiently competitive with that offered by incumbent carriers to permit a successful launch. Building a competitive system as a new entrant can be time-consuming due to the increasing difficulty of finding suitable sites and getting all of the local, state and federal regulatory approvals necessary to put the sites to use. Often, the most critical areas to serve (*e.g.*, congested center business district locales) are the most difficult to reach due to siting restrictions.
- Small carriers and entrepreneurial carriers often do not have unlimited financial resources and must, therefore, roll out service over time so that income generated in the initial service areas can be used to fund expansions. In these circumstances, the carrier has every intention of becoming a facility-based competitor, but the timetable is dictated by the financial realities. Notably, this could become an increasing phenomenon due to the uneasiness in today's credit markets.
- The carrier seeking roaming rights may be using the spectrum in the home market in a way or with a technology that is incompatible with its other systems. For example, a carrier offering CDMA voice services in multiple markets may acquire or deploy a WiMax network in a new market. Should a CDMA voice customer of this carrier be prevented from receiving CDMA voice service as a roamer in the new market when the spectrum held by the Requesting Carrier in the Host Carrier's market is devoted to a different technology? Such a restriction would force carriers to put CMRS spectrum in

²⁷ See Service Rules for the Advanced Wireless Services in the 2155-2175 MHz Band, WT Docket No. 07-195, *Notice of Proposed Rulemaking*, FCC 07-164 at para. 72 (rel. Sept. 19, 2007).

every market to the same use - - rather than alternate uses which competitive market forces are dictating. This could deter innovation and new technology deployments.

All of the above examples present situations in which a Requesting Carrier desires in-market roaming with every intention of becoming a facility-based competitor. This demonstrates that the blanket restriction on in-market roaming arrangements is overly-broad and ill-conceived.

C. Standing Alone, the Commission Desire to Promote Facility-Based Service Cannot Negate Common Carrier Obligations

The sole justification offered by the Commission for excluding in-market roaming is to promote facility-based competition. However, promoting facility-based competition is not the sole or the overriding purpose of the Communications Act. Rather, the ultimate objective of the Communications Act is to foster “rapid, efficient, Nation-wide and world-wide wire and radio communication service.”²⁸ Many provisions of the Act promote approaches other than facility-based competition to meet this core objective. For example, statutory mandates pertaining to resale,²⁹ unbundled access to network elements,³⁰ and interconnection³¹ all deal with legitimate alternatives to building a competing system to provide communications service. And, each of these statutorily-sanctioned alternatives creates a disincentive to enter a market as a facility-based competitor. If a CLEC can resell an ILEC service, or purchase network elements, it has less incentive to build its own network. Similarly, if a CMRS carrier can demand interconnection rights, it will be less likely to build its own local termination facilities. This being the case, it is clear that the promotion of facility-based competition is not the “be all and end all” of telecommunications policy.

²⁸ 47 U.S.C. § 151.

²⁹ 47 C.F.R. § 251(b)(1).

³⁰ 47 C.F.R. § 251(c)(3).

³¹ 47 C.F.R. § 251(c)(2).

This is particularly true in the wireless arena since the Commission repeatedly has found that the CMRS marketplace already is highly competitive.³² Given this Commission-found fact, a bald conclusory recitation that the public interest is better served by promoting further facility-based competition, rather than by allowing in-market roaming, cannot suffice.

IV. THE PUBLIC INTEREST ANALYSIS IN THE *ROAMING ORDER* IS FLAWED IN MANY RESPECTS

The Commission cites no statutory or legal impediment to permitting in-market roaming. Rather, its reasoning is grounded in a public interest rationale. However, its analysis is flawed in many critical respects.

A. The Home Roaming Restriction is Based on a Mistake of Fact

In the *Roaming Order*, the Commission agrees with a position advanced by Cingular Wireless that “if a carrier is allowed to ‘piggy-back’ on the network coverage of a competing carrier in the same market, then both carriers lose the incentive to build out into high cost areas in order to achieve superior network coverage.”³³ This perception is mistaken. A Requesting Carrier has no right to get free access to the Host Carrier network, nor any right to gain access at cost or at a cost-based or TELRIC rate. Rather, the Host Carrier is able to assess a reasonable charge and, in ascertaining what is reasonable, the Commission can allow the Host Carrier to earn a sufficient profit to assure the Host Carrier has an adequate economic incentive to build out high cost areas. Importantly, the Commission expressly declined in the *Roaming Order* to adopt a default rate, a benchmark rate or a rate cap.³⁴ One primary reason the Commission declined to limit roaming rates was because “regulation to reduce roaming rates has the potential to deter

³² See, e.g., *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 06-17, 21 FCC Rcd. 10947 (2006) where the Commission found that 98 percent of the total U.S. population has access to three or more service providers.

³³ *Roaming Order*, para. 49.

³⁴ *Id.* at paras. 37, 38.

investment in network deployment by impairing buildout” and reducing “incentives to expand, maintain, and upgrade... existing networks.”³⁵ Given the decision of the Commission to eschew adopting any roaming rate cap - - a decision that MetroPCS is not contesting here - - it is nonsensical for the Commission to claim that allowing in-market roaming will deter Host Carriers from building in high cost areas. Host Carriers will be able to set a reasonable rate and earn a fair rate of return on their investment, which eliminates this Commission concern.³⁶

The *Roaming Order* also fails to address adequately the compelling evidence in the record indicating that an in-market roaming right will not prevent Requesting Carriers from establishing their own facilities in overlapping markets. Interestingly, the Commission alludes to this evidence, but offers no explanation for rejecting it. At paragraph 47 of the *Roaming Order*, the Commission acknowledges comments of MetroPCS and SouthernLINC indicating that Requesting Carriers would not use in-market roaming in lieu of building because doing so would reduce their profits and increase their prices to their customers.³⁷ MetroPCS had pointed out in its comments cited by the Commission that the costs of providing facility-based service were significantly lower than those of nationwide incumbent carriers. This fact, coupled with the right of a Host Carrier to earn a profit on its roaming services, makes it diseconomic in the long run for MetroPCS to opt to serve viable areas by roaming rather than by building. MetroPCS also noted that its ability to offer a fully competitive roaming rate would always be hindered if it was paying the Host Carrier a roaming fee that included a profit margin.

Thus, the inclusion of in-market roaming as part of the automatic roaming rules will not provide any substantial incentives for carriers to ride the coattails of the larger, incumbent

³⁵ *Id.* at para. 40.

³⁶ It also may be reasonable for a Host Carrier to charge a higher roaming rate in a high cost area. This would be much better than allowing a Host Carrier to deny in-market roaming altogether.

³⁷ *Id.* at para. 47.

carriers. It simply is not economically feasible or sound business practice for any carrier to pursue a strategy based on roaming at the expense of building its own network, particularly when spectrum rights are being acquired in auction proceedings at market prices. MetroPCS has a strong incentive to initiate its own service and earn a return on its license investments, rather than pay its competitors a profit. These principles apply equally to in-market and out-of-market roaming. Carriers have an incentive to build out their markets to their fullest capacity, but this is often balanced by certain marketplace limitations that also apply. The automatic roaming rules can help solve this problem, but only if they apply equally to all markets – home and away.

Notably, the *Roaming Order* contains no reasoned explanation as to why the Commission rejected the comments of MetroPCS and SouthernLINC. Having been presented with credible evidence by experienced regional carriers that in-market roaming rights would not deter their continued system expansion and build out, it was incumbent upon the Commission to address these claims and not to reject them summarily. Reasoned decision making requires the Commission to “consider the relevant evidence presented and offer a satisfactory explanation for its conclusion.”³⁸ Here, that standard was not met.

B. The In-Market Roaming Restriction Harms Consumers

The *Report and Order* properly recognizes that “CMRS consumers increasingly rely on mobile telephony services and they reasonably expect to continue their wireless communications even when they are out of their home *network* area.”³⁹ This reference to “home network area” rather than “home license area” appropriately recognizes that, from the consumer’s point of view, the relevant consideration is whether an area actually is covered by the Home Carrier’s network, not whether it happens to fall within the Home Carrier’s license boundary. The

³⁸ *Celcom Communications Corp. v. FCC*, 789 F.2d 67, 71 (1986).

³⁹ *Roaming Order*, para. 3.

Roaming Order also recognizes that seamless automatic roaming benefits mobile subscribers because most “expect to roam automatically on other carriers’ networks when they are out of their home service area.” Again, the reference to “home service area” rather than “home license area” highlights the consumer focus on whether a particular area is served, not whether it is licensed.

Commissioner Adelstein put it best when he said in his separate statement to the *Roaming Order* that “no customer should have to see the words ‘No Service’ on their wireless device when there is a compatible network available.”⁴⁰ Yet, a denial of access to a compatible network is exactly what occurs with the Commission’s in-market roaming exclusion. This result clearly contravenes the objective set forth in Section 1 of the Act to foster “Nation-wide” service.⁴¹

C. Curbs on In-Market Roaming Rights Raise Substantial Public Safety Issues

Commissioner Tate has correctly observed in her comments to the *Roaming Order* that there “may be benefits to public safety, or even homeland security, in having mobile subscribers connected at all times, even while they are outside their home networks.”⁴² The public safety consideration comes as no surprise since one of the core objectives of the “rapid, efficient, Nation-wide...service” to be fostered by Section 1 of the Act is to promote “the national defense” and “safety of life.”⁴³ The problem is that the Commission has sacrificed these important public interest benefits in the hope of promoting further facility-based competition (which may not occur and may not promote consumer welfare if it does). In this case, the public interest would be better served by seizing the obvious, tangible benefit of improved communication services through broader roaming rights.

⁴⁰ *Roaming Order*, Statement of Commissioner Jonathan S. Adelstein, Approving in Part, Concurring in Part.

⁴¹ 47 U.S.C. § 151.

⁴² *Roaming Order*, Statement of Commissioner Deborah Taylor Tate.

⁴³ 47 U.S.C. § 151.

As Commissioner Adelstein observed, “it is our job here at the Commission to step in and ensure that consumers have access to both voice and data when they leave their home service area.”⁴⁴ It makes no difference to the consumer whether their carrier happens to hold an undeveloped license in the area to which the customer roams. What matters is that service be received while roaming, particularly in times of national emergency. These public safety considerations should tip the scale in favor of a more robust automatic roaming right.

D. Increasing Facility-Based Competition is Not Uniformly Beneficial

The Commission bias in favor of facility-based competition assumes that the public interest will be best served if every licensed carrier builds out every inch of territory licensed to it. This is a false assumption. For example, some market areas are so sparsely populated that they cannot economically support another network. Although the introduction of the second or third facility-based competitor may have public interest benefits, the arrival of the fourth, fifth or sixth carrier present diminishing returns, particularly in a sparsely populated area that will not support the investment. Indeed, all carriers can suffer, with a resulting deterioration in service to the public, if there is a completely wasteful duplication of services and facilities. As the court noted in *Telocator Network of America v. FCC*, “[o]ne of the fundamental premises of a regulatory scheme such as that established by the Communications Act ... is to avoid a wasteful duplication of facilities contrary to the public good.”⁴⁵ Indeed, the “Commission itself has recognized that injection of competition into a market served by marginally viable carriers may do the greatest injury to the public’s service.”⁴⁶ The Commission’s blind adherence to the

⁴⁴ *Roaming Order*, Statement of Commissioner Jonathan S. Adelstein, Approving in Part, Concurring in Part.

⁴⁵ *Telocator Network of America v. FCC*, 691 F.2d 525, 549 (D.C. Cir. 1982)

⁴⁶ *Id.*

promotion of further facility-based competition in every market already served by a Host Carrier, violates these sound premises.

Moreover, some carriers have specialized business plans that serve niche audiences and are not well-suited to all market areas. For example, MetroPCS offers wireless broadband voice services on a no long term contract, flat-rate, unlimited usage basis. This service is particularly well-suited to metropolitan areas with certain demographic characteristics because of the cost advantages of serving high density areas. The Commission's *Roaming Order* assumes that the public interest is best served by forcing MetroPCS to cover every inch of its licensed territory. This assumption is wrong. For MetroPCS to match the coverage area of the national incumbents, it likely would have to cease offering the unlimited services which compete so effectively with both wireless and wireline carriers. The Commission's policies should foster a variety of business plans and encourage new entrants to develop innovative services for niche markets. This is especially true when carriers like MetroPCS are able to offer competition both to wireless and wireline carriers. Indeed, over 88% of MetroPCS customers use MetroPCS wireless service as their sole primary telecommunications service. Penalizing carriers and customers by denying them automatic roaming rights in unbuilt overlap areas is an ill-advised "one size fits all" approach that mistakenly presumes that unlimited network coverage is the only desirable business plan.

E. The Commission's Recent Spectrum Allocation Decisions Argue Against the In-Market Roaming Restriction

MetroPCS has been a regular commenter in the Commission's recent broadband spectrum allocation proceedings. The company has been a consistent advocate of a "building block" approach in which spectrum is subdivided into smaller spectrum blocks and smaller market areas, which bidders can then assemble into larger blocks and areas to meet their respective business plans. For example, in the AWS spectrum allocation proceeding which led

up to Auction 66, MetroPCS asked the Commission to subdivide certain markets slated to be licensed on a Regional Economic Area Grouping (“REAG”) basis into smaller areas.⁴⁷

Similarly, in the recent 700 MHz allocation proceeding, MetroPCS urged the Commission to add at least one smaller geographic area - - an Economic Area (EA) or Cellular Market Area (CMA) - - to the upper 700 MHz band, rather than licensing it on a REAG basis.⁴⁸

Unfortunately, the Commission did not accept these MetroPCS allocation recommendations. In the AWS Auction, the Commission ended up auctioning off the D, E and F Blocks, representing 40 MHz of the 90 MHz of spectrum, on a REAG basis.⁴⁹ The direct result of this allocation decision was that MetroPCS - - which would have preferred smaller market sizes better suited to its business plan - - ended up acquiring multiple REAG markets including many areas where MetroPCS will be a new entrant.⁵⁰ MetroPCS expects to fully develop these markets over time. However, because of the AWS spectrum clearing requirements, and the need to set construction priorities within the confines of the available MetroPCS financial resources, it will be some time before construction is completed. In the meantime, the in-market roaming exclusion will have a devastating effect. For example, MetroPCS will be precluded from invoking automatic roaming rights in the entire Northeast and Northwest regions of the United States as a direct result of the in-market roaming exclusion.

⁴⁷ See, e.g., MetroPCS *Ex Parte* Letters dated June 29, 2005 and July 28, 2005 in WT Docket No. 02-353.

⁴⁸ See Comments, Reply Comments and *Ex Parte* Letters filed by MetroPCS in WT Docket No. 06-169.

⁴⁹ See Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, WT Docket No. 02-353, *Order on Reconsideration*, 20 FCC Rcd. 14058 (2005).

⁵⁰ Specifically, MetroPCS won the AWS D-Block REAG licenses in the Northeast and the West. See *Public Notice*, DA 06-1882 (rel. Sept. 20, 2006).

Notably, immediate 100% coverage within a geographic region is neither required nor contemplated by any of the FCC's construction and build out rules.⁵¹ Yet, the Commission has adopted an immediate 100% exclusion of any licensed home market area from the automatic roaming requirement. This means that a licensee who is entirely compliant with its license conditions is being penalized through the loss of valuable roaming rights on the date of grant. This represents an impermissible *sub silentio* attempt to revisit and increase pre-existing build out requirements that were properly promulgated through notice and comment rulemaking proceedings and upon which applicants in prior spectrum auctions relied in acquiring licenses. The looming loss of roaming rights also creates powerful disincentives for a carrier with an existing roaming arrangement to enter a market as a facility-based carrier. The effect is particularly harsh since 100% coverage in all markets is unrealistic and technologically unfeasible at this time.

Since the Commission has opted to assign so much spectrum on the basis of large market areas, and seems to be trending even further in that direction,⁵² it should not retain an in-market roaming exclusion that applies from the moment of licensing without regard to the nature and extent of system development.

F. The Home Roaming Prohibition Actually Discourages Facility-Based Competition by Creating a Significant Barrier to Entry

The home roaming restriction creates a substantial barrier to entry into the wireless industry and as a consequence is anticompetitive, not pro-competitive. The home roaming prohibition presents an existing carrier wanting to expand its service area with a Hobson's choice

⁵¹ Even for 700 MHz band, which has the most stringent build out requirements ever, licensees need only build out 70% of the area in 8 years.

⁵² The 700 MHz allocation includes not only REAG licenses, over the objection of many small and mid-sized carriers, but also includes a nationwide block. *See* Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, *Second Report and Order*, 22 FCC Rcd. 15289 (2007).

- - either elect to roam or to build. The immediate, flash-cut loss of roaming rights in licensed markets in the *Roaming Order* does not allow the Requesting Carrier to pursue both avenues. This is a classic example of a barrier to entry since the existing carrier will not be able to take advantage of a rise in price in the roaming market to offer facility-based service. Further, carriers completely new to wireless will be deterred because they will be forced to build facilities before they offer service to compete with carriers who have had a 20+ year headstart to construct networks. This headstart may be insurmountable for carriers wanting to compete directly with the existing carriers.

In addition, the home roaming prohibition also would harm competition by inhibiting carriers with existing in-market roaming agreements that are of a relatively short duration from entering auctions and buying spectrum since doing so could result in an immediate loss of roaming services by existing customers. In this case, the choice to expand will largely be driven not by forces related to the market opportunity, but rather by the length of any existing roaming contract and its applicability to a particular area. Unfortunately, carriers with substantial roaming relationships with other markets are the ones the Commission should be encouraging, not discouraging, from entering the market as a new facility-based competitor. Just as a successful resale operation in a market can encourage the reseller to build and operate its own network, robust roaming traffic in a market could incent a carrier to enter the market as a facility-based carrier. No doubt the reseller would be inhibited from market entry if the existing resale arrangement evaporated as soon as the ink was dry on the reseller's new spectrum license for the market. Similarly, the *Roaming Order* inhibits the carrier whose customers are roaming in other markets from becoming a network operator in the other market because of the immediate loss of existing rights. This does not serve the public interest because carriers with roaming traffic of

this nature have the resources, experience and customer base most likely to enable them to become robust new entrants.

The home roaming prohibition has the harshest effect on smaller carriers, and it will further accelerate the consolidation of the industry and its increasing concentration in the hands of a few carriers. While it examines the merger applications of AT&T with Dobson, Verizon with Rural Cellular Corporation, and T-Mobile with Suncom, the Commission should ask whether the recent *Roaming Order* (and its preclusion of home roaming) had any impact on the decisions of the smaller carriers to merge out of existence. Since the need for roaming outside the area currently served by a carrier is of vital importance to carriers, it would not be surprising to find that the Commission's *Roaming Order* may have provided some impetus to these recent mergers.

G. The Home Roaming Exclusion Will Have Negative Unintended Consequences

The overly broad in-market roaming restriction will have a chilling effect on bidding in the forthcoming 700 MHz auction. As noted above, the 700 MHz band plan is skewed in favor of larger market areas with fewer CMAs and EAs than recommended by a substantial number of commenters. Applicants who want to participate in the auction now must factor in the loss of automatic roaming rights that will come with the acquisition of a larger than ideal market area. The last thing the Commission should want to do is take actions that reduce the prospects of a robust auction, particularly when Congress is counting on the proceeds of the auction to fund the digital television transition and other important policy objectives, including some related to public safety.⁵³

⁵³ See *Deficit Reduction Act of 2005*, Pub. L. No. 109-171, 120 Stat. 4 (2006).

This concern over the chilling effect of the in-market roaming restriction on the 700 MHz auction should spur the Commission to remove the in-market restriction sooner rather than later. By statutory fiat, the 700 MHz auction is slated to commence in January 2008 and to be concluded by June of 2008.⁵⁴ Consequently, the Commission must act promptly to remove the home-roaming exclusion as soon as possible in order to cure the chilling effect on the upcoming auction.

Another unintended consequence of the home market roaming restriction is that beneficial, pro-competitive agreements that now exist in the marketplace will evaporate over time. As earlier noted, the *Roaming Order* indicates that the Commission wishes to “encourage all CMRS carriers” to enter into voluntary agreements which include “automatic roaming in overlapping geographic markets.”⁵⁵ However, the rule adopted by the Commission will have precisely the opposite effect. Host Carriers have been alerted by the *Roaming Order* that they can deny in-market roaming rights with impunity. And, existing in-market roaming arrangements certainly will not be renewed. The inevitable result will be a material loss of beneficial roaming rights by countless consumers simply because the *Roaming Order* will embolden the nationwide carriers and empower them to take even harder lines in roaming negotiations. Since the *Roaming Order* effectively acknowledges that the free market is not working adequately to foster beneficial automatic roaming agreements, the Commission cannot reasonably conclude the in-market arrangements it seeks to encourage will come to pass.

H. The In-Market Roaming Restriction is Unworkable

In addition to the legal and policy arguments against the home roaming exclusion, there are several practical implementation problems that make a restriction of this nature unworkable.

⁵⁴ *Id.*

⁵⁵ *Roaming Order*, para. 49.

As the Commission knows, broadband CMRS licenses have been assigned across a broad range of geographic market areas including Rural Service Areas (RSAs), Metropolitan Trading Areas (MTAs), Cellular Markets Areas (CMAs), Major Economic Areas (MEAs), EAs, Economic Area Groupings (EAGs), REAGs and nationwide licenses. In many instances, a single licensee will have multiple spectrum blocks in different bands (e.g., cellular, PCS, AWS) that are partially overlapping. Customers are served in the overlapping territories using dual-band or tri-band phones. And, in some cases, overlapping service areas may be devoted to different technologies. These facts and circumstances raise difficult implementation issues when it comes to the in-market exclusion. The situation is rendered even more complicated by the fact that roaming arrangements need to be implemented on a switch-by-switch and/or a wire center-by-wire center basis, neither of which correlate fully with licensed geographic areas. This adds complexity, and at times impossibility, to the equation.

MetroPCS is party to at least one roaming agreement that includes in-market roaming rights - - albeit at a different (higher) per minute rate - - as well as out-of-market roaming. Consequently, MetroPCS knows first hand that, in practice, drawing distinctions between in-market and out-of-market roaming rights is a difficult challenge and a serious distraction. The situation will only become worse as more and more spectrum is allocated using an increasingly diverse collection of designated market areas.

Commissioner Copps made the astute observation in his comments to the *Roaming Order* that “[c]onsumers should not have to be amateur engineers or telecom lawyers to figure out which mobile services they can expect to work when they travel.”⁵⁶ In the case of the in-market roaming restriction, the situation will be even worse than Commissioner Copps imagined. A

⁵⁶ *Roaming Order*, Statement of Commissioner Michael J. Copps, Approving in Part, Concurring in Part.

consumer could be both an engineer and a telecom lawyer and still not be able to reliably ascertain in advance if and when roaming services would be available given the patchwork of license areas and different service bands that exist. The better course would be to drop the in-market restrictions so that consumers can reasonably expect to get roaming service on a compatible network in any area to which they travel.

V. THE IN-MARKET ROAMING EXCLUSION WILL FOSTER UNREASONABLE DISCRIMINATION

The removal of any in-market roaming requirement from the automatic roaming rules allows, and may even encourage, nationwide carriers to act unjustly, unreasonably and in a discriminatory manner with regard to the negotiation and execution of in-market roaming agreements. By excluding in-market roaming agreements from the new automatic roaming rules, the Commission essentially has provided the large incumbent carriers with *carte blanche* to discriminate and price-gouge. Yet, the mere fact that the Commission felt compelled to issue its automatic roaming rules is an acknowledgement that the free market alone will not create a level playing field among wireless carriers in the realm of roaming. As noted by Commissioner Adelstein, the competitiveness of the retail CMRS market does not mean that the wholesale roaming market is competitive.⁵⁷ A set of minimum basic standards is required, not only for out-of-market roaming, but also for in-market roaming.

This is particularly true in light of the Commission's stated goal to "encourage all CMRS carriers to negotiate desired terms and conditions of automatic roaming agreements, including automatic roaming in overlapping geographic markets."⁵⁸ By refusing to mandate in-market automatic roaming, while expressly encouraging voluntary in-market roaming agreements, the

⁵⁷ *Roaming Order*, Statement of Commissioner Jonathan S. Adelstein, Approving in Part, Concurring in Part.

⁵⁸ *Roaming Order*, para. 49.

Commission is inviting carriers to pick and choose particular roaming partners. Incumbent carriers will have an excuse - - indeed, an incentive - - to discriminate against select competitors. No doubt incumbents will use this as an opportunity to disadvantage the most competitively disruptive carriers the incumbent faces in the market. Having already concluded that the free market is not working to foster fair roaming arrangements, it makes no sense for the Commission to assume that the voluntary in-market roaming agreement approach will foster anything other than contention in the marketplace.

MetroPCS is very surprised that the Commission did not, at the very least, require Host Carriers who offer in-market roaming to do so on a non-discriminatory basis. Even if the Commission were ultimately to decide that automatic in-market roaming was not a requirement -- which it should not do -- the Commission has the authority to prohibit carriers who offer such roaming to some carriers not to unreasonably discriminate against others.⁵⁹ Otherwise, the home roaming prohibition will become a Sword of Damocles hanging over the operation of many smaller wireless carriers who may hold spectrum outside their home area, but need roaming rights in order to compete. Since the larger carriers can now withhold such rights on renewal of the existing roaming agreements, smaller carriers are incented to sell out to their larger competitors.

VI. CONCLUSION

The foregoing premises having been duly considered, MetroPCS respectfully requests that the Commission reconsider the *Roaming Order* and remove the exclusion of in-market or home roaming from the common carrier obligation to provide automatic roaming service.

⁵⁹ Cf. *Conxus v. Paging Network, Inc.*, 13 FCC Rcd. 14034 (1998) (complaint against paging carrier alleging unlawful discrimination in entering into resale agreements with some but not all requesting carriers even though there was no resale obligation).

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