

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

In the Matter of )  
 )  
Reexamination of Roaming Obligations of ) WT Docket No. 05-265  
Commercial Mobile Radio Service Providers )  
\_\_\_\_\_ )

**SPRINT NEXTEL CORPORATION  
PETITION FOR RECONSIDERATION**

Sprint Nextel Corporation (“Sprint Nextel”) hereby petitions the Federal Communications Commission (“Commission” or “FCC”) to reconsider its August 16, 2007, Report and Order (“*Roaming Order*”) requiring wireless carriers to provide certain intercarrier roaming services to competitors.<sup>1</sup> The Commission’s decision to single out push-to-talk (“PTT”) service is arbitrary and capricious and unsupported by the record evidence. Moreover, the Commission’s application of an “in-market” restriction compounds the error by applying these new obligations inconsistently and in a manner that will distort competition.

**I. THE ADOPTION OF RULES MANDATING INTERCARRIER PUSH-TO-TALK ROAMING IS ARBITRARY AND CAPRICIOUS**

The Commission did not extend its new rules to VoIP and other services not interconnected with the PSTN because the record evidence “lacks a clear showing that it is in the public interest at this time to impose an automatic roaming obligation.”<sup>2</sup> The Commission, however, made an exception for push-to-talk (“PTT”), finding that it would “serve the public

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<sup>1</sup> See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, FCC 07-143 (Aug. 16, 2007), summarized in 72 Fed. Reg. 50064 (Aug. 30, 2007) (“*Roaming Order*”). Sprint Nextel submits this petition pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.429.

<sup>2</sup> *Roaming Order* at ¶ 56.

interest to extend automatic roaming obligations to push-to-talk.”<sup>3</sup> Sprint Nextel respectfully submits that this decision is contrary to the record evidence and is, therefore, arbitrary and capricious.

In addition to being arbitrary and capricious, Sprint Nextel notes that the decision is not generally applicable to the industry, but rather addresses a specific dispute between two parties, Sprint Nextel and SouthernLINC Wireless (“Southern”). The FCC has recognized that CDMA and GSM-based PTT services are “not close substitutes” to iDEN-based PTT services and that iDEN-based services have a “strong advantage over all other PTT offerings.”<sup>4</sup> Thus, for all practical purposes, the new PTT mandate is effectively a bill of attainder requiring Sprint Nextel to assist its principal PTT competitor.

**A. The Reasons Cited in the *Roaming Order* Do Not Justify the New Push-to-Talk Mandate**

None of the four reasons the *Roaming Order* cites for its PTT ruling supports the decision. First, the *Order* states that PTT is “typically bundled as a feature on the handset with other CMRS services . . . that are interconnected with the public switched network.”<sup>5</sup> The *Order*, however, never explains the relevance of this bundling point to intercarrier roaming. Non-interconnected data services, the FCC has recognized, are also bundled with interconnected voice;<sup>6</sup> yet the FCC appropriately did not extend a roaming mandate to data services or to VoIP.

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<sup>3</sup> *Id.* at ¶ 54. The FCC also imposed a roaming obligation on short messaging services (“SMS”). *Id.*

<sup>4</sup> *Sprint/Nextel Merger Order*, 20 FCC Rcd 13967, 14002 ¶ 94, 14005 ¶¶ 106-07 (2005).

<sup>5</sup> *Id.* at ¶ 55. This statement is accurate with respect to iDEN-based PTT services but not with CDMA-based PTT services.

<sup>6</sup> *See Sprint/Nextel Merger Order*, 20 FCC Rcd 13967, 13987 ¶ 46 (2005)(“PTT is generally bundles as a feature with other services such as mobile voice and mobile data on the handset.”). *See also Modernization of Auction Rules*, 21 FCC Rcd 4753, 4773 ¶ 59 (2006); *Seventh CMRS Competition Report*, 17 FCC Rcd 12985, 13005 n.487 (2002).

Thus, the mere fact that a feature is bundled on a handset cannot be a basis to justify a PTT roaming obligation.

Second, the *Order* implies that extending the new mandate to PTT was necessary to promote regulatory parity, stating that PTT is an “interconnected feature or service in some instances, but not interconnected in others.”<sup>7</sup> The *Order*, however, does not cite any record evidence for this assertion and, in fact, there is no such evidence. The *only* evidence in the record on this point is that PTT services are not interconnected with the PSTN.<sup>8</sup> This is consistent with prior FCC orders recognizing that PTT does “not operate through interconnection with the [PSTN].”<sup>9</sup>

The *Order* elsewhere cites two prior orders for the proposition that “some” wireless carriers (not identified) offer PTT “via the public switched network.”<sup>10</sup> However, neither of the two cited orders makes such statements.<sup>11</sup> The record evidence is undisputed. Sprint Nextel has indicated that neither its iDEN-based nor CDMA-based PTT services interconnect with the PSTN. Further, it is Sprint Nextel’s understanding that PTT-based services provided over GSM/EDGE networks also are not interconnected with the PSTN. Accordingly, there is no regulatory parity issue for the FCC to resolve.

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<sup>7</sup> See *Roaming Order* at ¶ 55.

<sup>8</sup> See SouthernLINC Ex Parte, Dispatch Connectivity Diagram (July 18, 2007).

<sup>9</sup> *Ninth CMRS Competition Report*, 19 FCC Rcd 20597, 20634 ¶ 89 (2004). See also *Sprint/Nextel Merger Order*, 20 FCC Rcd at 13988 ¶ 46 (PTT “differs from mobile voice communications because it is generally not interconnected with the [PSTN].”).

<sup>10</sup> See *Roaming Order* at n.123.

<sup>11</sup> In the *Sprint/Nextel Merger Order*, 20 FCC Rcd 13967, 13987 ¶ 46 (2005), the FCC stated that PTT “differs from mobile voice communications because it is generally not interconnected with the [PSTN]” (emphasis added). Similarly, there is nothing on page 10973 of the *Eleventh CMRS Competition Report*, 21 FCC Rcd 10947 (2006) that supports the proposition that some PTT services are interconnected with the PSTN.

Third, the Commission states a roaming mandate for PTT is warranted because it is “aware that consumers consider push-to-talk and SMS as features that are typically offered as adjuncts to basic voice services.”<sup>12</sup> The *Order* does not cite any record evidence to support this assertion and Sprint Nextel has found no such evidence. Moreover, PTT does not meet the criteria for classification as an “adjunct to basic service.” The FCC has ruled that an adjunct to basic service must meet three criteria:

1. The feature must be intended to “facilitate the use of traditional telephone service;”
2. The feature does “not alter the fundamental character of telephone service;” and
3. The feature “should be directly related to the provision of telephone services.”<sup>13</sup>

PTT services do not meet any of these criteria. PTT does not “facilitate” the use of interconnected voice service, and it is not related at all, much less “directly related,” to the provision of interconnected voice services. PTT service is a completely different service that serves an entirely different consumer need, as evidenced by the recent attempts of numerous carriers to add PTT to their portfolio of services.<sup>14</sup>

Finally, the *Order* states that “consumers . . . expect the same seamless [roaming] connectivity . . . as they travel outside their home network service areas.”<sup>15</sup> Once again, this

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<sup>12</sup> *Roaming Order* at ¶ 55.

<sup>13</sup> *U S WEST Reverse Search Capacity Order*, 11 FCC Rcd 7997, 8003 ¶ 12, 8004 ¶ 14 (1996)(FCC holds that a reverse search capability was not an adjunct to basic service because it was “not necessary to make the call.”). In the context of wireless services, the FCC has similarly held that an adjunct to basic feature must be “necessary or used in call completion.” *CPNI Order*, 13 FCC Rcd 8061, 8097 n.178 (1998), *citing NATA Order*, 3 FCC Rcd 4385 (1988).

<sup>14</sup> Additionally, to be adjunct to basic service, one would assume that the PTT service would be so integrated into the service offering that all wireless consumers would have and make use of the service. Such is not the case with PTT as customers of only two carriers – Sprint Nextel and Southern – have access to the iDEN based PTT services.

<sup>15</sup> *Roaming Order* at ¶ 55.

claim is made without citing any evidence in the record (and once again, no such record evidence exists). This assertion cannot be accurate because if it were true, Southern would not be in business today, as it has never offered its customers a PTT option when they travel outside its two-state service area.<sup>16</sup> Southern's success in the market rather confirms that access to intercarrier PTT roaming is not needed to succeed in the marketplace.

Agency orders will not survive appellate review if the agency does not engage in reasoned decision making.<sup>17</sup> Specifically, the Commission must "consider the relevant factors and articulate a rational connection between the facts found and the choice made."<sup>18</sup> As the Supreme Court has held:

An agency [decision is] arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>19</sup>

Sprint Nextel respectfully submits that Commission has not engaged in reasoned decision making given that none of the four reasons cited for the PTT ruling support the decision or are grounded in record evidence.

**B. The PTT Ruling Constitutes an Unexplained Departure from Precedent and Undermines the FCC's Goal to Promote Facilities-Based Competition**

The Commission has held that new intercarrier roaming rules should not be imposed "unless it is clear that providers' practices are unreasonably hindering the operation of the market

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<sup>16</sup> In addition to Alabama and Georgia, SouthernLINC serves small portions of Florida and Mississippi. See <http://www.southernlinc.com/index.asp>.

<sup>17</sup> See *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 52 (1983).

<sup>18</sup> *Vonage v. FCC*, 489 F.3d 1232, 1241 (D.C. Cir. 2007).

<sup>19</sup> *Motor Vehicles*, 463 U.S. at 43.

to the detriment of consumers.”<sup>20</sup> Thus, the Commission appropriately found in the *Roaming Order* that there was “insufficient evidence to justify regulating the roaming rates of carriers, and that any harm to consumers in the absence of affirmative regulation in this regard is speculative:”

Absent a finding that the existing level and structure of roaming rates harm consumers, regulation of rates for automatic roaming service is not warranted.<sup>21</sup>

Similarly, the Commission declined to impose a roaming mandate on other non-interconnected services because the record “lacks a clear showing that it is in the public interest at this time to impose an automatic roaming obligation.”<sup>22</sup> Yet, the FCC imposed a new intercarrier PTT roaming mandate without any demonstration of a market failure harming consumers.

The Commission has repeatedly noted that wireless carriers compete on many variables, including coverage, and that this non-price competition benefits consumers.<sup>23</sup> This competition is illustrated by Sprint Nextel and Southern, each of which offer PTT services to consumers in Alabama and Georgia. One difference between their PTT offerings is the coverage available to consumers in these two States: Southern’s coverage is limited primarily to the two States; in contrast, Sprint Nextel offers these consumers the option of nationwide PTT coverage – an option that Sprint Nextel can offer only because it took the risk of making investments that Southern chose not to make.

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<sup>20</sup> *2000 Roaming NPRM*, 15 FCC Rcd 21628, 21635 ¶ 128 (2001).

<sup>21</sup> *Roaming Order* at ¶ 38. *See also id.* at ¶ 44 (FCC declines to adopt “most favored rate” proposals because the proposals’ proponents had not made a “clear demonstration of why such a requirement would serve the public interest.”).

<sup>22</sup> *Id.* at ¶ 56. *See also id.* at ¶ 60 (“[B]ased on the current record, it is premature to impose any roaming obligation regarding enhanced data services that are not CMRS and are not interconnected to the [PSTN].”).

<sup>23</sup> *See, e.g., Eleventh CMRS Competition Report*, 21 FCC Rcd 10947 at ¶ 101 (2006); *Sprint Nextel Merger Order*, 20 FCC Rcd 13967, 14002 ¶ 92 (2005); *Alltel/Western Wireless Merger Order*, 20 FCC Rcd 13053, 13077 ¶ 59 (2005).

There is no market failure because Sprint Nextel and Southern offer consumers in Alabama and Georgia different coverage options. To the contrary, the FCC recognized in its *Order* that competition based on geographic coverage “benefits consumers by allowing them to choose pricing plans that offer the best deal on the types of services they use most frequently.”<sup>24</sup> Yet, by ordering Sprint Nextel to provide PTT roaming to its direct competitor to ensure that its competitor has the identical nationwide footprint, the Commission has effectively eliminated PTT geographic coverage as a basis for competition between Sprint Nextel and Southern. The *Order* never explains how eliminating carriers’ geographic scope of coverage as a basis for competition promotes the public interest.<sup>25</sup>

## **II. THE IN-MARKET/OUT-MARKET DISTINCTION IS IRRATIONAL AND APPLIES SECTIONS 201-202 IN A DISCRIMINATORY MANNER**

In concluding that there is a 201/202 roaming obligation, the *Roaming Order* distinguishes between “in-market” and “out-of-market” intercarrier roaming. Specifically, carriers are required to provide roaming to a competitor if that competitor does not hold spectrum in a given market (“out-of-market” roaming). Conversely, carriers can simply refuse a roaming request (for any reason or no reason) from a competitor in a market where that competitor holds a spectrum license (“in-market” roaming).<sup>26</sup> This distinction, however, is irrational. Either the public interest is served by imposing an obligation to provide roaming services or it is not. By creating this in/out market distinction, the Commission introduces distortion in the marketplace and undermines the basis for its imposition of roaming obligations in the first place.

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<sup>24</sup> *Roaming Order* at ¶ 44.

<sup>25</sup> Appellate courts have held that “an unexplained departure from prior agency policy is not a reasonable [decision].” *Goldstein v. SEC*, 451 F.3d 873, 883 (D.C. Cir. 2006), quoting *Northpoint v. FCC*, 412 F.3d 145, 156 (D.C. 2005). See also *Morall v. DEA*, 412 F.3d 165, 183 (D.C. Cir. 2005).

<sup>26</sup> See *Roaming Order* at ¶ 48.

**A. The Exclusion of In-Market Roaming is Inconsistent With the Commission’s Basis for Imposing Out-of-Market Roaming**

The Commission cited several reasons for its finding that an in-market roaming obligation would “not serve [the] public interest:”

- Such a mandate could “harm facilities-based competition,” because carriers will “not likely” build-out networks if they can rely on their competitor’s network;
- Such a mandate could “adversely impact[] network quality reliability and coverage;” and
- Such a mandate could “disadvantage” consumers by a “lack of product differentiation, lower network quality, reliability and coverage.”<sup>27</sup>

The *Order*, however, fails to recognize that the same factors that led the Commission to determine that an in-market roaming rule would be incompatible with the public interest applies equally well to out-of-market roaming. Carriers negotiate out-of-market roaming agreements to compete more effectively in their home market (by offering its home customers a larger service footprint when they travel). If, as the FCC has held, the public interest would be disserved by the provision of in-market roaming, the same public interest necessarily is disserved by the provision of out-of-market roaming to a competitor.

Under the new rules, Sprint Nextel is not required to provide intercarrier roaming to MetroPCS in the Miami area, because MetroPCS already has a network in Miami (which, it claims, serves more customers than Sprint’s Miami network). However, Sprint must provide roaming in such areas as Memphis, Milwaukee and Mobile because MetroPCS does not own any spectrum in these areas. MetroPCS will resell this “out-of-market” roaming to its Miami customers so it can compete more effectively with Sprint Nextel in the Miami market – *not* in the

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<sup>27</sup> *Roaming Order* at ¶ 49.

Memphis, Milwaukee and Mobile markets. In short, carriers use “out of market” roaming to compete more effectively in the home market.

**B. The In-Market Exclusion Will Distort Competition**

Sprint Nextel continues to maintain that roaming services do not require regulatory intervention. However, to the extent the FCC has found that roaming is a Section 201 obligation, its decision that this statute will apply to only some carriers but not others is arbitrary and capricious. Intercarrier roaming either is, or is not, a common carrier service. If it is a common carrier service, then all providers of this common carrier service should be subject to the same obligations. To hold otherwise would create inherent inequities and distortions of the market.

In-market roaming is defined as “any geographic location where the would be host carrier and the requesting CMRS carrier have wireless licenses or spectrum usage rights that could be used to provide CMRS that cover or overlap the same geographic location(s).”<sup>28</sup> Under this definition, no carrier has an obligation to provide roaming services to AT&T Mobility, Verizon Wireless, T-Mobile or Sprint Nextel (because they hold licenses throughout the country) but these carriers are obligated to open their networks to competitors. Thus, Sprint Nextel could find itself in a position in which it was required to negotiate a roaming agreement with a requesting carrier, but the requesting carrier would have no obligation to allow Sprint Nextel to roam on its network. Sprint Nextel, or any other carrier, should have the same right to demand roaming of other carriers as other carriers have the right to demand roaming of it.

Sprint Nextel’s preference is that the Commission allow markets to operate without regulatory intervention – unless there is a demonstration of market failure harming consumers.<sup>29</sup>

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<sup>28</sup> *Roaming Order* at ¶ 50.

<sup>29</sup> Such market failures can arise in a variety of circumstances. One example is where a governmental agency and a carrier execute an exclusive contract that bars other carriers with licensed

But if the Commission determines that regulatory intervention is warranted, it must apply new rules in a nondiscriminatory, competitively neutral manner. Whatever intercarrier roaming policy the Commission decides to apply to the competitive wireless industry, it must be applied in a uniform fashion.

### **III. CONCLUSION**

For the foregoing reasons, Sprint Nextel respectfully requests that the Commission reconsider its *Roaming Order* consistent with the view expressed above.

Respectfully submitted,

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spectrum in the geographic area from providing coverage in the area (*e.g.*, the D.C. Metro System contract with Verizon), thereby precluding customers from having wireless access in these public areas. Another example is the action of a local zoning board precluding one carrier from installing a cell site in order to match the coverage of its competitor (that earlier received zoning board approval to enter the area). Sprint Nextel believes that these situations are best addressed on a case-by-case basis *via* the complaint process, rather than by generic rules; however, that complaint process is available to carriers only if their competitor has a 201/202 obligation to provide roaming service.