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 REPLY COMMENTS

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November 16, 2007

Table of Contents

Executive Summary …….…….. ii

I. The Commission Should Reconsider Its Push-to-Talk Ruling ….…… 1

A. The PTT Ruling Constitutes an Unexplained Departure from Commission Precedent That Consumers Benefit When Carriers Compete on Coverage……. 2

B. The Adoption of Rules Mandating PTT Roaming Is Also Arbitrary and Capricious……. 3

1. The Reasons the Commission Cited for the PTT Ruling Do Not Support the New Mandate……..…….. 4

2. Southern's New Theory for Defending the PTT Ruling Lacks Merit …..…. 7

3. Leap's Arguments Also Lack Merit …….. 8

II. If Some Intercarrier Voice Roaming Is Common Carrier Activity, Then All Voice Roaming Is Common Carrier Activity and Subject to Sections 201 and 202…… 9

III. The Commission Does Not Possess the Authority to Impose a Common Carrier Roaming Obligation on Non-Interconnected Wireless Services, as SpectrumCo Claims …… 11

IV. Conclusion…….. 13

EXECUTIVE SUMMARY

The Federal Communications Commission ("Commission") should reconsider its imposition of a new Push-to-Talk ("PTT") roaming mandate as inconsistent with previous precedent, unsupported by the record and contrary to Congress' limited imposition of common carrier obligations to CMRS or interconnected voice services. The Commission should also reconsider its attempt to define roaming as a common carrier service subject to Sections 201 and 202 of the Act for some carriers but not for others. Either roaming is a common carrier service or it is not. The Commission has not taken the legal steps necessary to forebear from the application of these sections to certain carriers.

1. <u>The Commission Should Reconsider the Imposition of a PTT Roaming Mandate</u>

The Commission's imposition of a new PTT roaming mandate ignores previous precedent and is incompatible with the FCC's finding elsewhere in the *Roaming Order* that competition based upon geographic coverage "benefits consumers." Contrary to SouthernLINC Wireless' ("Southern's") arguments, the relevant market for this service is the area where consumers interested in PTT can choose either Southern's or Sprint Nextel's PTT service. In this market, the roaming obligation eliminates competition on geographic coverage because roaming would enable Southern to offer PTT consumers the same national coverage that Sprint Nextel offers to PTT consumers in the same market.

Southern's additional assertion that its inability to access Sprint Nextel's PTT network "directly harms US consumers" is completely unsupported and lacks merit. The only harm Southern identifies is harm to its own corporate welfare. Southern concedes that its PTT customers who value coverage beyond its two-state areas will simply "switch to a carrier with

broader geographic coverage." The fact that a customer may choose a different carrier does not demonstrate a market failure, however. On the contrary, it demonstrates a functioning market.

2. The Commission should reconsider the in-home roaming exemption

The Commission's distinction between in-market and out-of-market roaming is not legally sustainable. Voice roaming services are either Commercial Mobile Radio Services ("CMRS") subject to the common carrier service obligations of Sections 201 and 202 of the Act or they are not. Applying a common carrier obligation to some carriers but not others is arbitrary and capricious, and not legally sustainable. Although Congress in Section 10 of the Act has authorized the Commission to exempt telecommunications services from the common carrier obligations specified in Section 201 and 202, the *Roaming Order* did not follow the procedures Congress prescribed for taking such action.

3. Non-interconnected services should not be subject to common carrier obligations

The Commission appropriately segregated non-interconnected wireless services from interconnected voice roaming services. Congress expressly limited the common carrier obligations of wireless carriers to CMRS services. By definition, CMRS services are interconnected voice services. Spectrum Co is wrong in asserting that the line the Commission drew – interconnected wireless services are subject to a common carrier roaming obligation, while non-interconnected services have no such obligation – is "arbitrary." The line the FCC drew is the very same line Congress drew when it established CMRS services. The FCC lacks the authority to impose a common carrier roaming obligation on non-interconnected wireless services, including PTT.

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PETITION FOR RECONSIDERATION
REPLY COMMENTS

Sprint Nextel Corporation ("Sprint Nextel") submits this reply in support of its Petition for Reconsideration of the Federal Communications Commission ("Commission") decisions (a) requiring intercarrier roaming for push-to-talk services, and (b) adopting an in-market/out-market distinction for determining whether intercarrier voice roaming is a common carrier service subject to Sections 201 and 202 of the Communications Act.[1] The comments filed in response to the Sprint Nextel petition provide no evidence to support the Commission's actions nor can they correct the legal shortcomings contained in the *Roaming Order*.[2]

I THE COMMISSION SHOULD RECONSIDER ITS PUSH-TO-TALK RULING

Only two parties, Leap Wireless International ("Leap") and SouthernLINC Wireless ("Southern"), oppose Sprint Nextel's reconsideration petition as applied to push-to-talk ("PTT") services. Neither set of comments provides record evidence that would support the arbitrary conclusions drawn by the Commission or explain the Commission's departure from prior prece-

[1] *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers,* Sprint Nextel Petition for Reconsideration, WT Docket No. 05-265 (filed October 1, 2007).

[2] *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers,* WT Docket No. 05-265, FCC 07-143, 22 FCC Rcd 15817 (Aug. 16, 2007), *summarized* in 72 Fed. Reg. 50064 (Aug. 30, 2007) ("*Roaming Order*").

dent. Indeed, these two oppositions only confirm that the PTT ruling is arbitrary and capricious, incompatible with all precedent and not supported by substantial evidence.

A. THE PTT RULING CONSTITUTES AN UNEXPLAINED DEPARTURE FROM COMMISSION PRECEDENT THAT CONSUMERS BENEFIT WHEN CARRIERS COMPETE ON COVERAGE

The Commission recognized in the *Roaming Order* and in earlier orders that wireless carriers compete on many variables, "including geographic coverage."[3] For example, Southern has limited its PTT coverage to Alabama and Georgia, while Sprint Nextel offers consumers in these two States the option of nationwide PTT coverage. The Commission has recognized that this type of competition "benefits consumers" by allowing them to choose plans offering "the best deal on the types of services they use most frequently."[4] Yet, by adopting its PTT roaming rule, the Commission has effectively eliminated geographic coverage as a basis for competition between PTT providers Sprint Nextel and Southern, because PTT roaming would enable Southern to offer consumers in Alabama and Georgia the same national coverage that Sprint provides.[5]

Southern claims that Sprint Nextel's past refusal to assist Southern in providing national coverage "directly harms US consumers."[6] Southern's opposition, however, does not identify any harm to consumers by Sprint Nextel's position. Rather, the harm Southern identifies is harm to its own corporate welfare, with Southern conceding that its PTT customers who value cover-

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[3] *Roaming Order* at ¶ 44. For additional citations, *see* Sprint Nextel Reconsideration Petition at 6 n.23.

[4] *Roaming Order* at ¶ 44.

[5] *See* Sprint Nextel Reconsideration Petition at 5-7.

[6] Southern Opposition at 15. Southern makes its assertion – "automatic roaming does not eliminate geographic coverage as a basis for competition" – by discussing the options available to consumers who reside in the areas where Southern has no network – that is, in areas where Southern and Sprint do <u>not</u> compete. *See id.* at i and 17-18

age beyond its two State area will "switch[] to a carrier with broader geographic coverage."[7] This is ***not*** a "market failure" as Southern claims.[8] Rather, *this is the very type of facilities-based competition that the Commission has recognized "benefits consumers*."[9]

Southern asserts that the Commission should require Sprint Nextel to affirmatively assist Southern so that Southern can compete more effectively against Sprint Nextel. The Commission, however, is "not at liberty to subordinate the public interest to the interest of equalizing competition among competitors."[10] As the record evidence has established, there is no market failure that requires correction in the wireless market. Indeed, the wireless market is widely acknowledged to be the most competitive market in telecommunications.

The Commission fails to provide any rational basis for this change in competitive policy. The elimination of competitive differentiation based on geographic coverage for PTT services is simply incompatible with the Commission's finding that consumers benefit when carriers compete on geographic coverage. Based on prior precedent that the PTT ruling did not address, Sprint Nextel urges the Commission to reconsider its PTT ruling.

B. THE ADOPTION OF RULES MANDATING PTT ROAMING IS ALSO ARBITRARY AND CAPRICIOUS

The Commission declined to impose a roaming mandate on "non-interconnected features or services" because it determined that the record "lacks a clear showing" that such a mandate

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7 *Id.* at 17.

8 *See id.* at 15.

9 *Roaming Order* at ¶ 44.

10 *800 MHz Rebanding Reconsideration Order*, 20 FCC Rcd 16015, 16048 ¶ 73 (2005), *quoting SBC* v. *FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995). *See also McCaw/AT&T Merger Reconsideration Order*, 10 FCC Rcd 11786, 11792-93 ¶ 9 (1996)("[T]he Communications Act requires us to focus on competition that benefits the public interest, not on equalizing competition among competitors.").

would be in the public interest.[11] The Commission, however, created an exception for PTT services, finding that it "would serve the public interest to extend automatic roaming obligations to push-to-talk."[12]

Sprint Nextel demonstrated in its reconsideration petition that the Commission's decision to treat PTT differently from other non-interconnected/non-CMRS services was contrary to the record evidence and thus, arbitrary and capricious.[13] Southern counters by claiming that Sprint Nextel's argument – there is no record evidence supporting the new PTT roaming mandate – is "vague and general."[14] Southern further asserts that the PTT ruling is supported by an "extensive body of record evidence,[15] although a careful review of Southern's lengthy opposition only confirms the absence thereof.

1. The Reasons the Commission Cited for the PTT Ruling Do Not Support the New Mandate

Sprint Nextel demonstrated in its reconsideration petition that none of the four reasons the Commission cited in its *Roaming Order* supports its PTT decision.[16]

(a) Customer Expectations. The Commission justified its PTT ruling because it "is aware" that "customers . . . expect the same seamless connectivity with respect to [PTT] as they travel outside the home network service areas."[17] The *Order* does not support this reason with any record evidence. Sprint Nextel also pointed out in its petition that this unsupported state-

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11 *See Roaming Order* at ¶ 56.

12 *Id.* at ¶ 54.

13 *See* Sprint Nextel Reconsideration Petition at 1-5.

14 Southern Opposition at 4. *See also id.* at i, 1 and 20.

15 *Id.* at 5.

16 *See* Sprint Nextel Reconsideration Petition at 2-5.

17 *Roaming Order* at ¶ 55.

ment could not possibly be accurate because, if it were true, Southern would not be in business today as it has never offered its PTT customers coverage when they travel outside its two-state service area.[18] Specifically, Southern cannot credibly contend that its PTT customers "expect" to have PTT coverage outside its two-state area when it has never offered such an option to its customers.

Southern nevertheless asserts that there exists "substantial" and an "extensive body of record evidence" to support the Commission's conclusion that PTT customers "expect to roam" when traveling in areas not served by their home carrier.[19] Southern, however, is able to cite only two pieces of "evidence" in support of this sweeping allegation. First, Southern references ¶ 53 of the *Roaming Order*, which cites an earlier pleading where Southern stated that some subscribers "highly value" PTT service.[20] Sprint Nextel does not dispute that some consumers highly value PTT service, but this is not evidence that PTT customers "expect to roam" when traveling outside the area covered by their PTT provider's network.

Second and finally, Southern cites to four "customer" letters it submitted in the record, which state that it would be "useful" and "beneficial" to have access to PTT roaming.[21] It is understandable that the Commission did not rely on these letters, as all four letters were prepared

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[18] Sprint Nextel Reconsideration Petition at 5 ("Southern's success in the market rather confirms that access to intercarrier PTT roaming is not needed to success in the marketplace.").

[19] *See* Southern Opposition at 5 and 14-15.

[20] *See id.* at 14 n.45. In ¶ 53, the FCC also cites Southern pleadings asking that "data services be included as part of an automatic roaming obligation." But data roaming is separate from PTT roaming, as evidenced by the fact that Southern treats them as separate. *See, e.g.,* ***Add citations***. Also, in declining to impose a roaming mandate for data services in the *Roaming Order*, the FCC obviously was not persuaded by Southern's pleadings.

[21] *See* Southern Comments at 14-15 and Attachment E.

by Southern's affiliates.[22] These four affiliate letters do not constitute probative evidence, and they certainly do not constitute substantial evidence.

There is, in short, no credible record evidence supporting the Commission's conclusion that PTT customers "expect to roam" when traveling outside their PTT provider's service area.

(b) The Commission's Three Other Reasons. The Commission also cited three additional reasons for its PTT ruling (*e.g.*, bundled handsets, adjunct to basic service, Public Switched Telephone Network "PSTN" interconnection). Sprint Nextel demonstrated flaws with each of these reasons.[23] Rather than rebut this demonstration with facts, Southern instead claims that these three reasons are simply different ways of "describing customer perception of PTT" – namely, that PTT customers "generally expect" to roam when they travel outside their PTT provider's service area.[24] But as discussed immediately above, there is no probative record evidence that PTT customers do, in fact, expect to roam when traveling outside their PTT provider's service area.

* * *

In summary, Southern's lengthy opposition only confirms that the portion of the *Roaming Order* as it pertains to push-to-talk service is not based on substantial evidence and is otherwise arbitrary and capricious.

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[22] The four letters were signed by Alabama Power, Georgia Power, Gulf Power and Mississippi Power. Like SouthernLINC, all four companies are owned by the Southern Company. *See* http://investor.southerncompany.com/about,cfm.

[23] *See* Sprint Nextel Reconsideration Petition at 2-5.

[24] *See* Southern Opposition at 5-6, 8 and 11. Southern does make a new claim in its opposition: "Kodiak's PTT application is an interconnected service that uses a voice circuit and telephony services." Opposition at 10. Southern, however, provides no record support for this assertion, and since Southern does not use Kodiak's application, it is not apparent that Southern even has personal knowledge of how this application works.

2. Southern's New Theory for Defending the PTT Ruling Lacks Merit

Southern, effectively conceding that the PTT ruling is not based on any evidence, asserts that the Commission need not support its decisions with substantial evidence because it can instead rely on its "cumulative experience and expertise."[25] This argument has no legal basis.

Courts have held that agency decisions, including public interest findings, must be based on substantial evidence.[26] As the Supreme Court has stated:

> Congress . . . intended that agency findings under the Act would be supported by "substantial evidence on the record considered as a whole."[27]

The one appellate court decision upon which Southern now relies, *Wisconsin Power*, is consistent with this long-standing precedent.[28] This court did not hold that an agency may make public interest findings without regard to the evidence. Rather, the *Wisconsin Power* court held an agency may rely on publicly available evidence not submitted in the record – so long as the agency cites the evidence upon which it relies:

> The [agency] may rely on publicly available information so long as it is referenced, thereby enabling "meaningful adversarial comment and judicial review;" such material need not be directly introduced into the record. A footnote is enough. However, the [agency] may not rely on data known only to the agency.[29]

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[25] *See* Southern Opposition at 1, 2-5 and 20. *See also id.* at 7 (FCC can rely on its "substantial experience.").

[26] *See, e.g., U.S.* v. *Midwest Video,* 406 U.S. 649, 671 (1972)("The question remains whether the [FCC] regulation is supported by substantial evidence that it will promote the public interest."); *Permian Basin Area Rate Cases,* 390 U.S. 747, 791-92 (1968)("[T]he court must examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence."); *Pappas* v. *FCC,* 807 F.2d 1019, 1023 (D.C. Cir. 1986)(FCC "public interest" finding was "supported by the record and based on a proper understanding of the law."); *TRAC* v. *FCC,* 800 F.2d 1181, 1185 (D.C. Cir. 1986)("The record in this case provides substantial evidence to support the FCC's [public interest] conclusion.").

[27] *Motor Vehicle Mfgrs. Ass'n* v. *State Farm,* 463 US. 29, 35 (1983)(supporting citation omitted).

[28] *See* Southern Opposition at 2-5, *citing Wisconsin Power* v. *FERC,* 363 F.3d 453 (D.C. Cir. 2004).

[29] *Wisconsin Power,* 363 F.3d at 463.

This court did not, as Southern suggests, hold that the Commission can ignore the substantial evidence standard simply by relying on its "cumulative experience and expertise."

Given that the Commission in its PTT ruling did not rely on publicly available evidence not introduced into the record, other than to cite to a few of its own earlier decisions, the relevance of the *Wisconsin Power* case to this docket is not apparent.

3. Leap's Arguments Also Lack Merit

Leap also opposes Sprint Nextel's PTT petition – although Leap's interest in this subject is not apparent, as it does not (at least to Sprint's knowledge) offer PTT and is thus ineligible to make a PTT roaming request.[30] Leap, however, merely repeats Southern's assertion that PTT customers "expect to roam" when they travel outside their home PTT network.[31] Leap's views regarding the roaming expectations of PTT customers is hardly substantial evidence given that Leap does not offer PTT service and has no information about the expectations of Southern's customers.

Leap also contends that Sprint Nextel has "failed to identify any evidence countering the [FCC's] observations."[32] The burden, however, is on proponents of new rules to submit evidence for the changes they seek. Here, the proponents of PTT roaming rules submitted no evidence to support the regulation they sought, as confirmed by the fact that the Commission's PTT ruling cited no evidence for its ruling.

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[30] *See* Leap Opposition at 2-3; *Roaming Order* at ¶ 55 (To invoke the rule, "the requesting carrier must offer [PTT] to its subscribers on its home network.").

[31] Leap Opposition 2-3. Also like Southern, Leap asserts that customer expectations are formed by the bundling in handsets of interconnected and non-interconnected services (*see id.* at 2), although also like Southern, Leap does not explain how this bundling factor justifies PTT roaming when the FCC determined that handset bundling of other non-interconnected services did not justify a roaming mandate.

[32] Leap Opposition at 3

II. IF SOME INTERCARRIER VOICE ROAMING IS COMMON CARRIER ACTIVITY, THEN ALL VOICE ROAMING IS COMMON CARRIER ACTIVITY AND SUBJECT TO SECTIONS 201 AND 202

Sprint Nextel, throughout this proceeding, has opposed government intervention into competitive markets,[33] and it repeated this position in its reconsideration petition.[34] Other parties, in contrast, supported regulation of all aspects of roaming. The Commission in its *Roaming Order*, however, attempted to "split the baby" and imposed a common carrier obligation with respect to out-of-market roaming, but not for in-market (or home) roaming.

Sprint Nextel explained in its reconsideration petition that the in-market/out-market distinction the Commission drew is not legally sustainable because it has the effect of applying a common carrier obligation to "some carriers but not others [which] 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.[35]

Verizon Wireless agrees with Sprint Nextel that the home roaming exclusion "put[s] large carriers at a disadvantage" because the "roaming requirement is not reciprocal."[36]

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[33] *See, e.g.*, Sprint Nextel Comments, at 2 (Nov. 28, 2005)("Adoption of a new roaming rule would contradict Congress' directive that the Commission '*promote competition and reduce regulation* in order to secure lower prices and higher quality services for American telecommunications consumers.'") (emphasis in original); *id.* at 21 ("The Commission got it right a decade ago: 'Market forces – not regulation – should shape the developing CMRS marketplace.'").

[34] *See* Sprint Nextel Petition at 9 ("Sprint Nextel continues to maintain that roaming services do not require regulatory intervention."); *id.* at 9 ("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.").

[35] *Id.* at 9.

[36] Verizon Wireless Opposition at 9. Verizon contends that this discrimination is not sufficient to justify elimination of the home roaming exclusion. Sprint Nextel believes that this discrimination is problematic and requires the FCC to take one of two steps: either (1) extend the new rules to all roaming, or (2) eliminate the roaming rule altogether.

Sprint Nextel respectfully submits that the fundamental problem with the *Roaming Order* is that the Commission attempted to achieve a desired result without following the procedures that Congress has specified. In the *Order*, the Commission clarified that intercarrier voice roaming is "a common carrier service, subject to the protections outlined in Sections 201 and 202 of the Communications Act."[37] If intercarrier roaming is deemed to be a common carrier service, then Sections 201 and 202 apply to all roaming services provided by all CMRS carriers.[38]

The Commission, however excluded from automatic roaming obligations in-market or "home roaming" because of its desire to encourage facilities based construction.[39] In other words, through its "home roaming exclusion," the Commission determined that home roaming is not a common carrier service and thus exempt from the obligations contained in Sections 201 and 202.

Congress, in Section 10 of the Act, has expressly authorized the Commission to exempt common carriers from the requirements of Title II, including Sections 201 and 202, but only "if the Commission determines that" –

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation is not necessary for the protection of consumers; *and*

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[37] *Roaming Order* at ¶ 23.

[38] Ordinarily, FCC authority, including under Sections 201 and 202, is limited to "interstate and foreign communications." *Compare* 47 U.S.C. § 152(a) *with id*. at § 152(b). However, Congress amended Section 2(b) in 1993 to give the FCC plenary authority over all CMRS, including intrastate CMRS. *See* H.R. CONF. REP. NO. 103-212, at 497 (1993); *Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, 9640 ¶ 84 (2001).

[39] *Roaming Order* at ¶¶ 49-50.

(3) forbearance from applying such provision or regulation is consistent with the public interest.[40]

The Commission has further "expressed skepticism that it would ever be appropriate to forbear from applying those sections" 201 and 202.[41]

While the Commission made a public interest finding for the "home market exclusion," the *Roaming Order* did not address the additional statutory criteria that Congress has specified are necessary before common carriers can be relieved of Title II obligations. Sprint Nextel submits that in exempting home roaming from the common carrier obligations contained in Sections 201 and 202 without following the procedures that Congress specified in Section 10, the *Roaming Order* is vulnerable on appeal and therefore should be corrected by the Commission.

To repeat, Sprint Nextel's preference is that the Commission allow competitive markets to operate without regulatory intervention. However, to the extent that the Commission determines that intercarrier voice roaming constitutes common carrier activity, then all such roaming (including in-market roaming) falls within the scope Sections 201 and 202.[42] If the Commission believes that some roaming should be exempt from these common carrier obligations, then it should follow the procedures that Congress has adopted for taking this course of action.

III. THE COMMISSION DOES NOT POSSESS THE AUTHORITY TO IMPOSE A COMMON CARRIER ROAMING OBLIGATION ON NON-INTERCONNECTED WIRELESS SERVICES, AS SPECTRUMCO CLAIMS

The Commission limited its new roaming rules to services "provided by CMRS carriers that are interconnected with the public switched network," stating that this finding is "consistent

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[40] 47 U.S.C. ¶ 160(a)(emphasis added).

[41] *SBC Forbearance Order*, 20 FCC Rcd 9361, 9368 ¶ 17 (2005). *See also PCIA Forbearance Order*, 13 FCC Rcd 16857, 16865 ¶ 15 (1998)("Sections 201 and 202 codif[y] the bedrock consumer protection obligations" and "lie at the heart of consumer protection under the Act.").

[42] *See* Sprint Nextel Reconsideration Petition at 9 ("Intercarrier roaming either is, or is not, a common carrier service.").

with the Commission's previous determinations."[43] SpectrumCo asks the Commission to reconsider this limitation on the scope of the roaming rules, alleging that the use of the PSTN in this manner is "an obvious anachronism and should be changed" because, SpectrumCo claims, it makes "no sense for the Commission to draw this arbitrary line."[44]

SpectrumCo's arguments lack merit because the line the Commission has drawn is not "arbitrary," but is rather a line drawn by Congress to achieve its objectives. In point of fact, the Commission does not possess the authority to impose a common carrier roaming obligation on wireless services that are not interconnected with the PSTN because those services are not common carrier services at all.

Congress has determined that a firm engaged in the provision of CMRS "shall, *insofar as such person is so engaged*, be treated as a common carrier for purposes of this chapter."[45] Moreover, Congress has determined that to be classified as CMRS, a licensee at minimum must make "interconnected service available,"[46] and it defined interconnected service as service that is "interconnected with the public switched network."[47] Thus, under the plain language of the Communications Act, a wireless service that does not use PSTN interconnection is not a CMRS service.

Congress, in using the phrase, "insofar as such person is so engaged," further made clear that non-CMRS (or non-interconnected) services shall not be treated "as a common carrier." Congress reinforced this intent in its definition of a telecommunications carrier:

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43 *Roaming Order* at ¶ 18.

44 SpectrumCo Reconsideration Petition at 14-15.

45 47 U.S.C. § 332(c)(1)(A)(emphasis added).

46 *Id*. at § 332(d)(1).

47 *Id.* at § 332(d)(2). *See also* 47 C.F.R. § 20.3 (definition of "Interconnected Service").

> A telecommunications carrier shall be treated as a common carrier under this chapter *only to the extent that it is engaged in providing telecommunications services*.[48]

Given the clarity with which Congress has spoken, the Commission does not possess the authority to impose a common carrier roaming obligation on non-CMRS (or non-PSTN interconnected) wireless services. As the Supreme Court has held in an analogous situation:

> The purpose of [Section 3(h)] and its mandatory working preclude Commission discretion to compel broadcasters to act as common carriers. . . . [T]hat same constraint applies to the regulation of cable television systems.[49]

Completely without merit is SpectrumCo's suggestion that the Commission's decision to limit the common carrier roaming obligation to CMRS services (*i.e.*, those that are PSTN-interconnected) is incompatible with Commission precedent. In fact, in its *Wireless Broadband Order*, the Commission explained in detail why non-interconnected wireless services are not CMRS and should not as a result, be treated as a common carrier service.[50]

Courts have held that the Commission may "not impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance."[51] Yet this is precisely what SpectrumCo urges the Commission to do – even though Congress had been clear that non-PSTN interconnected wireless services should not be subjected to common carrier obligations, such as the obligation to provide roaming to other wireless carriers.

IV. CONCLUSION

For the foregoing reasons, Sprint Nextel respectfully requests that the Commission reconsider its decision to impose an intercarrier roaming requirement on push-to-talk services. The

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48 47 U.S.C. § 153(44)(emphasis added).

49 *See, e.g.*, *FCC* v. *Midwest Video*, 440 U.S. 689, 705 (1979).

50 *See Wireless Broadband Order*, 22 FCC Rcd 5901, 5915-21 ¶¶ 37-56 (2007).

51 *Southwestern Bell* v. *FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

Commission has correctly determined that competition on geographic coverage "benefits consumers,"[52] and the PTT roaming eliminates this basis of competition and deprives consumers of the benefits resulting from this competition.

Sprint Nextel also respectfully requests that the Commission eliminate the in-market/out-market distinction. Intercarrier voice roaming either is, or is not, a common carrier service. If such roaming is a common carrier service, then all roaming (including in-market roaming) is subject to Sections 201 and 202. If such roaming is not a common carrier service, then no roaming (including out-of-market roaming) is subject to Sections 201 and 202.

Finally, the Commission should deny SpectrumCo's reconsideration petition. Congress has made abundantly clear that wireless services not using PSTN interconnection may not be treated as a common carrier service.

Respectfully submitted,

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[52] *See Roaming Order* at ¶ 44.