

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

In the Matter of)	
)	
Implementation of Section 6002(b) of the)	
Omnibus Budget Reconciliation Act of 1993)	
)	WT Docket No. 09-66
Annual Report and Analysis of Competitive)	
Market Conditions with Respect to)	
Commercial Mobile Services)	

COMMENTS OF BRIGHT HOUSE NETWORKS

Bright House Networks (“BHN”), by its counsel and pursuant to the invitation extended by the Federal Communications Commission (“FCC” or “Commission”) in its May 14, 2009 Public Notice (“*Public Notice*”),^{1/} hereby submits its comments regarding the state of competition among providers of Commercial Mobile Radio Service (“CMRS”), in order to aid the Commission in preparation of its Fourteenth Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services (“*14th CMRS Competition Report*”).

I. INTRODUCTION

BHN is the nation’s sixth largest cable Multiple System Operator (“MSO”). BHN is a full-service communications provider in Florida, Alabama, California, Indiana, and Michigan, with approximately 2.4 million customers. BHN was recently rated highest in customer satisfaction by J.D. Power and Associates for both voice and high speed data services in the

^{1/} *Wireless Telecommunications Bureau Seeks Comment on Commercial Mobile Radio Services Market Conditions*, Public Notice, WT Docket No. 09-66, DA 09-1070 (rel. May 14, 2009).

Southeast region.^{2/} In each of its systems, BHN offers advanced digital video, high speed data, and facilities-based competitive voice service.

While BHN is an active competitor in the wireline telecommunications marketplace, it contemplates introducing wireless and converged services as part of the variety of offerings to its customers. BHN has taken several steps to prepare for potential entry into the wireless market. In particular, BHN has obtained access to Advanced Wireless Services (“AWS”) spectrum through the SpectrumCo LLC joint venture,^{3/} participated in the 700 MHz Auction,^{4/} and invested in the construction of an advanced mobile WiMAX broadband network through Clearwire Corporation.^{5/} Even though BHN has taken these actions and despite the fact that it already has a foothold as an established player in the telecommunications industry, BHN still faces barriers, erected by competitors, to entry to the wireless marketplace. In particular, BHN and others are unable to secure roaming agreements at reasonable and nondiscriminatory rates. Without the ability to offer customers access to wireless services beyond the coverage area of a particular FCC authorization, BHN and others cannot effectively compete with national carriers. The upcoming 14th *CMRS Competition Report* should recognize the importance of carriers obtaining roaming agreements under reasonable and nondiscriminatory terms and conditions.

^{2/} Press Release, Bright House Networks, *Again and Again Bright House Networks Ranks Highest in Customer Service* (Nov. 25, 2008), available at <http://www.mybriighthouse.com/newsroom/article.aspx?id=29942>.

^{3/} See, e.g., Comments of SpectrumCo LLC, WT Docket Nos. 07-195 and 04-356 (filed July 25, 2008).

^{4/} BHN participated in the 700 MHz auction as Advance/Newhouse Communications.

^{5/} See, e.g., Application of Sprint Nextel Corporation and Clearwire Corporation for Consent to Transfer Control of Licenses and Authorizations, WC Docket No. 08-94 (filed June 6, 2008).

Consequently, BHN is pleased to have this opportunity to submit the following comments regarding “the state of competition among providers of CMRS.”^{6/}

II. COMMENTS

A. Background

The *Public Notice* states that in its most recent *CMRS Competition Reports*, the Commission “has reviewed competitive market conditions using a framework that groups indicators into four categories: (1) market structure; (2) provider conduct; (3) consumer behavior; and (4) market performance” and has urged parties responding to the *Public Notice* to address these four categories of indicators.^{7/} In the past, the Commission has recognized that roaming may be a “provider conduct” factor that affects competition.^{8/}

However, past reports have failed to recognize the negative impact that carriers’ inability to reach equitable roaming agreements has on the wireless marketplace. Indeed, in its most recent report, the Commission noted that many carriers offer service with, among other features, no roaming charges.^{9/} However, merely because a carrier does not assess its *customers* roaming charges does not mean that carriers are not assessed unfair roaming charges by other carriers. When that occurs, carriers simply will not invest in the construction and operation of competitive systems because they would be forced either to absorb the high roaming rates and be deprived of a realistic return rate on their investment or pass along the higher roaming rates to customers in the form of higher monthly fees and be unable to compete with carriers. It is contrary to the

^{6/} *Public Notice* at 1.

^{7/} *Id.* at 2.

^{8/} See, e.g., *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Thirteenth Report, WT Docket No. 08-27, DA 09-54, ¶ 156 (rel. Jan. 16, 2009) (“*13th CMRS Competition Report*”).

^{9/} *Id.* ¶ 111.

public interest for carriers to be forced to decide against entering the marketplace for those reasons. Accordingly, the 14th CMRS Competition Report that the FCC issues as a result of the *Public Notice* must more directly take into account the accessibility of roaming when determining the level of competition in the CMRS marketplace.

B. The Commission Has Already Recognized that Automatic Roaming Is Imperative for Wireless Entry

The Commission has noted that consumers expect their wireless devices to “roam automatically on other carriers’ networks when they are out of their home service area.”^{10/} Devices without adequate roaming capabilities have limited acceptance in the marketplace. All carriers, even the largest carriers with a national footprint, rely upon roaming agreements to fill coverage holes or provide service during network construction. For small or regional carriers, roaming is the only way they can offer the type of service to which today’s consumers are accustomed. Consequently, entry into the wireless market is rendered virtually impossible without access to commercially reasonable roaming agreements for both voice and data services. If a carrier is not able to offer roaming on the same terms as its competitors, it will not be able to compete in today’s marketplace.

C. While Automatic Roaming Is Recognized as Critical, Carriers’ Inability to Secure It Presents a Barrier to Competition

While the FCC has recognized the importance of automatic roaming, it has not yet taken effective action to ensure that roaming is available to all carriers under reasonable terms and conditions. Therefore, while the Commission has concluded that effective competition exists in

^{10/} See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, ¶ 27 (2007) (“*Automatic Roaming Order*”), *pet recon. pending*.

the wireless industry,^{11/} that diagnosis is not yet completely accurate. Therefore, the upcoming 14th CMRS Competition Report must accurately note that until roaming issues are resolved, carriers' inability to enter into equitable roaming agreements remains an impediment to competition.

The FCC and others have noted that the wireless marketplace is dominated by several national carriers that have both the power and a strong financial incentive to refuse to enter into commercially reasonable roaming agreements with small competitors and new entrants.^{12/} For

^{11/} See, e.g., 13th CMRS Competition Report ¶ 1 (finding “that there is effective competition in the CMRS market”); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Twelfth Report, 23 FCC Rcd 2241, ¶ 1 (2008) (finding “that there is effective competition in the CMRS market”); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Eleventh Report, 23 FCC Rcd 2241, ¶ 1 (2006) (finding “that there is effective competition in the CMRS market”).

^{12/} See, e.g., *An Examination of Competition in the Wireless Industry: Hearing Before the Subcomm. on Communications, Technology, and the Internet*, 111th Cong. (2009) (opening statement of Rep. Henry A. Waxman, Chairman, Comm. on Energy and Commerce) (“[I]t is clear that the market is becoming more concentrated. Two providers account for about 60% of the market, and the four largest account for about 90% of the market. This Committee must take care to ensure that this consolidation does not harm consumers.”); Brian Kraemer, *Text Message Price Prompts Antitrust Inquiry from Senator*, CHANNELWEB, Sept. 10, 2008 (reporting a letter from U.S. Senator Herb Kohl, a chair of the Judiciary Subcommittee on Antitrust, to the four largest U.S. wireless carriers expressing concern regarding consolidation in the wireless industry and stating that “of concern is that it appears that each of the companies has changed the price for text messaging at nearly the same time, with identical price increases . . . This conduct is hardly consistent with the vigorous price competition we hope to see in a competitive marketplace”); *Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation for Consent To Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases and Petitions for Declaratory Ruling that the Transaction Is Consistent with Section 310(b)(4) of the Communications Act*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 12463 (2008) (“*Verizon/RCC Merger Order*”) (statement of Commissioner Jonathan S. Adelstein) (“I also share many of the concerns of Senator Bernie Sanders regarding increased consolidation in the wireless industry and the need for continued buildout to benefit the citizens of Vermont and in rural America generally.”); *Automatic Roaming Order* ¶ 28 (“We are mindful of the ongoing complaints by small, regional and rural carriers against the nationwide carriers that, under certain market conditions, it is getting more difficult for small and rural

instance, Verizon and AT&T have no incentive to provide reasonable rates to other carriers, particularly cable companies -- like BHN -- with whom they compete for wireline and video services. To the contrary, industry consolidation has made it more likely that national carriers can use unfavorable roaming rates as an anti-competitive tool against non-national carriers. While in the past, non-national carriers may have been able to arrange a national roaming footprint with regional and local roaming partners, that option is quickly disappearing.^{13/} Without those regional and local alternatives, national carriers can insist on unfavorable roaming rates.

Therefore, if the Commission wishes to promote real competition among incumbent wireless providers and new entrants in the CMRS market,^{14/} it must remove this barrier and enable new entrants to obtain roaming agreements that facilitate the offering of wide-area and nationwide service plans. The upcoming *14th CMRS Competition Report* should note the action that the FCC has taken and that it may take in the future to address this impediment.

carriers to obtain access to nationwide carriers' networks through automatic roaming agreements.”).

^{13/} See, e.g., *Verizon/RCC Merger Order* ¶ 3; *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444 (2008); *Applications of AT&T Inc. and Centennial Communications Corp. for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, WT Docket No. 08-246, Second Protective Order, DA 09-1164 (rel. May 27, 2009); *Applications of AT&T Inc. and Dobson Communications Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 22 FCC Rcd 20295 (2007).

^{14/} *Public Notice* at 4, 7 (seeking comment regarding the “current level of concentration and the ease or difficulty with which new providers can enter the market” and “significant barriers to entry in the CMRS market”).

D. Current FCC Roaming Rules Do Not Effectively Counter Anti-Competitive Market Dynamics

BHN recognizes that the Commission already requires carriers to “provide automatic roaming to any technologically compatible home carrier, outside of the requesting home carrier’s home market, on reasonable and nondiscriminatory terms and conditions.”^{15/} While BHN appreciates the action that the Commission has taken to date, the Commission has not gone far enough. Without further definition or clarification, this requirement is insufficient to encourage CMRS competition because carriers have no way to show that an offered roaming arrangement is unreasonable or discriminatory. The Commission must further promote meaningful enforcement of the automatic roaming rule by defining the metrics and procedures governing violations of the rule. If the FCC clarifies what it considers to be reasonable and nondiscriminatory under this obligation, it will be able to prevent incumbent carriers from making roaming practically unavailable to new entrants as well as spur competition and innovation within the CMRS industry.

E. The FCC Must Make Automatic Roaming Readily Available on Reasonable and Nondiscriminatory Terms to Ensure a Vibrant, Competitive Wireless Marketplace

The FCC has the opportunity to better define the contours of the automatic roaming obligation in several Commission proceedings and thereby facilitate a new era of increased competition for the CMRS industry.^{16/} While there are many ways by which the FCC may

^{15/} 47 C.F.R. § 20.12(d).

^{16/} While BHN in these comments requests that the FCC take specific regulatory action to improve competition in the CMRS marketplace, such agency actions usually are **not** necessary and, in fact, can impede rather than advance the development of healthy markets in some contexts. BHN, like most cable providers, generally believes that the FCC’s regulatory approach should be to provide the framework in which a healthy competitive market may continue to develop. *See, e.g.*, Comments of the National Cable & Telecommunications Association, GN Docket No. 09-51, at 29 (filed June 8, 2009). Unfortunately, in this specific context, regulatory action is needed to achieve a fully competitive CMRS marketplace.

clarify and increase the enforceability of the current roaming obligations, BHN suggests that the FCC use retail yield for like services (*e.g.*, voice, data) to measure whether roaming rates are reasonable and nondiscriminatory.^{17/} Specifically, the FCC should require retail yield to be reported quarterly by the carrier operating the host system, specifying that such a carrier should report the average revenue divided by the average usage for each type of service.^{18/} Such reporting would make carriers more accountable for compliance with the automatic roaming obligation and would enable the FCC to evaluate the reasonableness of roaming rates should such a need occur. While BHN has recommended retail yield as a metric for determining the reasonableness of rates, other metrics may be appropriate as well.

In addition to clarifying the procedures for establishing compliance with the automatic roaming obligation, the FCC should (1) extend the obligation to all services, including data transmission services, and (2) eliminate the home roaming exception.^{19/} First, for today's wireless consumers, the use of data transmissions is equally, if not more important than voice roaming.^{20/} The inapplicability of the automatic roaming requirement to information services is

^{17/} Retail yield is simply the result of dividing a carrier's average revenue per unit ("ARPU") for a service by its usage for that service for the same time period.

^{18/} See also Comments of Bright House Networks, WT Docket No. 06-150 and PS Docket No. 06-229, at 9-10 (filed Nov. 3, 2008).

^{19/} BHN recognizes that the FCC is considering both of these matters in its current proceeding. See WT Docket No. 05-265 ("Roaming Proceeding"). The Commission should, in its 14th CMRS Competition Report, acknowledge the important impact that roaming rates have on CMRS competition and address how its actions have promoted roaming and, therefore, competition.

^{20/} See, *e.g.*, Paul Kirby, *Paper Urges Government to Begin Planning to Free Up More Spectrum*, TR DAILY, March 31, 2009 (reporting that carriers anticipate skyrocketing mobile data traffic, for example, "AT&T, Inc. has estimated that by 2018, mobile data traffic will grow between 250% and 600%").

unfounded and outdated, especially when viewed in light of the convergence of voice, video, and data services and advances in wireless technology, applications, and devices.^{21/}

Second, the automatic roaming requirement should not include an exception for home roaming. Even if new entrants have spectrum within their particular market, those entrants should have the option of obtaining roaming agreements with incumbent carriers on reasonable and nondiscriminatory terms. Arguments that home roaming would encourage spectrum holders not to build out their markets, and thus allow spectrum to lay fallow, are without merit. A licensee that has paid significant sums to obtain spectrum at a spectrum auction has a financial incentive to make good, economic use of the spectrum and build out its network. Even reasonable and nondiscriminatory in-home roaming rates create costs that carriers avoid when they operate their own infrastructure in a market. Therefore, economic incentives favor licensees' using spectrum that they have purchased rather than relying on roaming agreements to provide service. In any event, spectrum in almost all services is subject to mandatory build-out requirements. Consequently, the FCC has the potential to remove a significant competitive barrier to entry and thus advance CMRS competition by clarifying, expanding, and enforcing the automatic roaming obligation for incumbent wireless carriers.

III. CONCLUSION

Competition within the CMRS marketplace is not near as robust as it should be due to the inability of new entrants and small and regional carriers to obtain roaming agreements at reasonable and nondiscriminatory terms. The FCC can eliminate this barrier to entry by

^{21/} As others have noted in the Roaming Proceeding, the Commission has correctly found in the past that it has limited jurisdiction to regulate data service. No action that the FCC takes in the Roaming Proceeding should disturb that determination. However, where a data transmission service is an adjunct to, or a substitute for, a CMRS service, the FCC should take a different approach. Such an approach would permit the FCC to require automatic roaming for data services in at least some circumstances.

increasing the enforceability of the automatic roaming obligation and expanding it to include information services as well as home roaming. Adopting such measures today will drive CMRS competition in the future. The 14th *CMRS Competition Report* that the FCC adopts as a result of the *Public Notice* should recognize the importance of carriers obtaining roaming agreements on reasonable and nondiscriminatory terms and highlight the actions that the FCC has taken to ensure that conditions favorable to roaming exist.

Respectfully submitted,

BRIGHT HOUSE NETWORKS

By: Cody J. Harrison

/s/ Cody J. Harrison

Sabin, Bermant & Gould, LLP
Four Times Square
New York, NY 10036
Tel: 212-381-7117
Fax: 212-381-7218
Charrison@sbandg.com

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2009, I caused a true copy of the foregoing

Comments to be served as shown, upon:

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554
**Via ECFS*

Chelsea Fallon
Spectrum and Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554
Chelsea.Fallon@fcc.gov
**Via E-Mail*

Pramesh Jobanputra
Spectrum and Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554
Pramesh.Jobanputra@fcc.gov
**Via E-Mail*

Best Copy and Printing, Inc.
Portals II
445 12th Street S.W.
Room CY-B402
Washington, D.C. 20554
fcc@bcpiweb.com
**Via E-Mail*

/s/ Cody J. Harrison