

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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In the Matter of )

Wireless Telecommunications Bureau Seeks )  
Comment on Commercial Mobile Radio )  
Services Market Competition )

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WT Docket No. 09-66

**COMMENTS OF METROPCS COMMUNICATIONS, INC.**

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## SUMMARY

Although the retail CMRS marketplace is competitive, there are aspects of the industry that make it difficult for small, rural and regional wireless carriers to obtain certain necessary inputs, such as roaming services, which are critical for them to provide competitive wireless service offerings to their customers. The disappearance of several former roaming partners as a result of the recent market consolidation has made it much more difficult for small, rural and regional carriers to negotiate reciprocal roaming agreements.

Wireless customers increasingly view nationwide voice and data service as an absolute necessity, as opposed to merely a convenient option. As a result, small, rural and regional carriers simply must be able to expand their services using new spectrum resources and provide their customers with meaningful access to voice and data roaming at reasonable rates. Absent an opportunity to acquire spectrum in expansion areas and an improved ability to provide their customers with these necessary roaming services, small, rural and regional carriers are not able to compete effectively, and may well vanish from the marketplace over time, to the detriment of consumers nationwide. In sum, in order to allow new entrants and small, rural and regional carriers to compete effectively with the nationwide carriers, the Commission must: (i) abandon the in-market roaming exception; (ii) require all CMRS carriers to provide data roaming on just and reasonable terms; and (iii) conduct a full spectrum inventory to ensure the efficient distribution of unused and underused spectrum to spectrum-starved CMRS carriers.

Finally, exclusive handset agreements exacerbate the competitive problem by preventing small, rural and regional carriers from competing for customers using the latest technologies. In many instances, such exclusive arrangements result in the complete unavailability of cutting-edge wireless broadband technology in rural areas, increasing the urban-rural digital divide.

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**COMMENTS OF METROPCS COMMUNICATIONS, INC.**

MetroPCS Communications, Inc. (“MetroPCS”),<sup>1</sup> by its attorneys, hereby respectfully submits its comments pursuant to the Federal Communications Commission’s (the “FCC” or “Commission”) request for comment in the above-captioned proceeding.<sup>2</sup> As set forth in greater detail below, in order to allow small, rural and regional carriers to compete effectively with the national carriers, the Commission should (i) ensure that all wireless carriers possess the ability to offer their customers both voice and data roaming services at just and reasonable rates; (ii) conduct a thorough spectrum inventory, with the goal of allowing unused and underused spectrum to end up in the hands of new entrants, as well as rural, small and regional CMRS providers who so badly need it; and (iii) take action to address the impact of exclusive handset

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<sup>1</sup> For purposes of these Comments, the term “MetroPCS” refers to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

<sup>2</sup> *Wireless Telecommunications Bureau Seeks Comment on Commercial Mobile Radio Services Market Competition*, Public Notice, WT Docket No. 09-66, DA 09-1070 (rel. May 14, 2009).

agreements that negatively impact the market. In support, the following is respectfully shown:  
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## **I. THE CMRS MARKET IS RAPIDLY CONSOLIDATING**

The market for CMRS is experiencing an unprecedented period of consolidation, due in part to Commission policies that tend to favor large national carriers over rural or regional carriers and new entrants.<sup>3</sup> As of the publication of the *Thirteenth Report*, the Big-4 nationwide carriers (AT&T, Verizon Wireless, Sprint Nextel, and T-Mobile) accounted for approximately 92.2 percent of all wireless telephone subscribers in the United States.<sup>4</sup>

### **A. Recent CMRS Mergers**

Over the last twenty months, there has been significant consolidation in the wireless industry, with AT&T acquiring Dobson Communications,<sup>5</sup> AT&T acquiring Aloha Spectrum Holdings,<sup>6</sup> T-Mobile acquiring SunCom,<sup>7</sup> Verizon Wireless acquiring Rural Cellular

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<sup>3</sup> The results of Auction 73 are a telling example of this. Despite the voracious appetite of small, rural and regional carriers for additional spectrum, many came away with nothing to show for their bidding efforts due to market sizes and spectrum configurations that favored the large, nationwide carriers. Indeed, several major regional carriers, such as Alltel and Leap Wireless, were completely shut out of the auction. Others, such as MetroPCS and US Cellular, were only able to acquire a small amount of spectrum in comparison to their needs.

<sup>4</sup> *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*, Federal Communications Commission, Thirteenth Report, WT Docket No. 08-27, ¶ 14 (Jan. 16, 2009) (“*Thirteenth Report*”).

<sup>5</sup> *Applications of AT&T Inc. and Dobson Communications Corporation, For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, WT Docket No. 07-153, FCC 07-196 (rel. Nov. 19, 2007) (“*AT&T-Dobson Order*”).

<sup>6</sup> *Application of Aloha Spectrum Holdings Company LLC (Assignor) and AT&T Mobility II LLC (Assignee), For Assignment of Licenses and Authorizations*, Memorandum Opinion and Order, WT Docket No. 07-265, FCC 08-26 (rel. Feb. 4, 2008).

<sup>7</sup> *Applications of T-Mobile USA, Inc. and SunCom Wireless Holdings, Inc., For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, WT Docket No. 07-237, FCC 08-46 (rel. Feb. 8, 2008).

Corporation,<sup>8</sup> Sprint Nextel forming a joint venture with Clearwire,<sup>9</sup> and most recently, the Verizon-Alltel mega-merger.<sup>10</sup> In addition, AT&T has announced its plans to purchase regional wireless provider Centennial Communications Corp., a wireless provider with roughly 1.1 million wireless subscribers, in a transaction that is expected to close in the fourth quarter of this year.<sup>11</sup> This rapid consolidation has caused the market for roaming services to be increasingly concentrated.

The Commission required that Verizon Wireless and AT&T divest certain spectrum assets as a prerequisite to merger approvals in an effort to limit spectrum concentration and imposed certain conditions related to roaming on the Verizon-Alltel merger.<sup>12</sup> However, the spectrum divestitures did not end up with small, rural or regional carriers obtaining such additional spectrum. Rather, the Commission's spectrum divestiture mandate in the

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<sup>8</sup> *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*, Memorandum Opinion and Order and Declaratory Ruling, WT Docket No. 07-208, FCC 08-181 (rel. Aug. 1, 2008).

<sup>9</sup> *Sprint Nextel Corporation and Clearwire Corporation, For Consent to Transfer Control of Licenses, Leases, and Authorizations*, Memorandum Opinion and Order, WT Docket No. 08-94, FCC 08-259 (rel. Nov. 7, 2008) (“*Sprint-Clearwire Order*”).

<sup>10</sup> *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantic Holdings LLC, For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements*, Memorandum Opinion and Order and Declaratory Ruling, WT Docket No. 08-95, FCC 08-258 (rel. Nov. 10, 2008).

<sup>11</sup> “AT&T to Buy Centennial for \$944 Million,” MarketWatch, Nov. 7, 2008, *available at* <http://www.marketwatch.com/news/story/ATT-buy-Centennial-944-million/story.aspx?guid=%7bD6188F93-8FAE-4965-B728-EF498777431F%7d&print=true&dist=printMidSection> (last visited Jun. 1, 2009).

<sup>12</sup> Although the Commission imposed significant roaming conditions on the Verizon-Alltel merger, there is considerable dispute by Verizon regarding the scope of these conditions, as noted below.

Commission's Verizon-Alltel merger produced the absurd, but predicted,<sup>13</sup> result of having AT&T swoop in to purchase the divested spectrum, thereby merely replacing one Big-4 carrier with another.<sup>14</sup> AT&T announced on the same day that it would be selling to Verizon Wireless certain spectrum assets it was in the process of acquiring from Centennial in order to "resolve certain potential overlap issues...and help advance final regulatory approval of the Centennial acquisition."<sup>15</sup> In effect, the Verizon-Alltel and proposed AT&T-Centennial spectrum divestitures resulted in spectrum swaps between AT&T and Verizon that provide no additional spectrum for new entrants or small, rural or regional carriers.

Although the CMRS market is consolidating at a rapid rate, the Commission possesses the authority to institute a regulatory regime that will ensure that it remains competitive. To do so, the Commission must be sure to protect and preserve the ability of carriers to access roaming services. The Commission must ensure that all of the inputs necessary for competitive and comprehensive service offerings by rural and regional carriers – specifically, voice and data roaming and reasonable access to spectrum – are made available on just and reasonable rates. Where such inputs are freely available, markets function properly, competition flourishes and

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<sup>13</sup> *Petition of MetroPCS Communications, Inc. and NTELOS, Inc. to Condition Consent or Deny Application*, WT Docket No. 08-95 (Aug. 11, 2008). In its Petition, MetroPCS cautioned that the Commission "must ensure that divested markets and spectrum end up being acquired by entities which will preserve the competitive landscape and will be incented to offer automatic roaming to rural and regional mid-tier carriers on just and reasonable rates." MetroPCS Petition at 4. In fact, just the opposite has occurred.

<sup>14</sup> "AT&T to Acquire Divestiture Properties from Verizon Wireless, Enhance Network Coverage and Customer Service," Press Release, May 8, 2009, available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26803> (last visited Jun. 1, 2009). Some of the markets acquired by AT&T are CDMA and may be converted to GSM, thus limiting roaming for many carriers in those markets.

<sup>15</sup> "AT&T Agrees to Sell Certain Centennial Communications Corp. Assets to Verizon Wireless," Press Release, May 8, 2009, available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26804> (last visited Jun. 1, 2009).

consumers benefit. Where ready access to such inputs is denied, consumers across the country are harmed.

**B. The Market For Wireless Services and the Impact of Air Interfaces**

According to the information released in the Commission's *Thirteenth Report*, the “[a]verage concentration of the U.S. mobile telephone market, as measured by the Herfindahl-Hirschman Index (‘HHI’), was unchanged at 2674 at the end of 2007.”<sup>16</sup> With an HHI rating of 2674, the U.S. Department of Justice and the Federal Trade Commission consider the wireless industry to be “highly concentrated” according to their Horizontal Merger Guidelines, far exceeding the 1800 HHI benchmark number necessary for the “highly concentrated” designation.<sup>17</sup> The Horizontal Merger Guidelines further state that “[w]here the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise.”<sup>18</sup> Moreover, there is no question that concentration, as calculated by the HHI or any other measure, will have increased as a result of the many mergers and acquisitions described above, and that these numbers will be even higher when the Commission releases its *Fourteenth Report* to Congress.

The increasing concentration of the wireless industry is further demonstrated by the tremendous market share that the Big-4 carriers together control. As noted above, according to the *Thirteenth Report*, the Big-4 carriers account for 92.2 percent of all wireless subscribers.<sup>19</sup>

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<sup>16</sup> *Thirteenth Report* at 6.

<sup>17</sup> U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, § 1.51 (rev. Apr. 8, 1997).

<sup>18</sup> *Id.*

<sup>19</sup> *Thirteenth Report* at Table A-4.

Although it is true that 95 percent of the U.S. population has the choice of three or more carriers,<sup>20</sup> the choice generally is limited to members of the Big-4 carriers.

To be properly analyzed, the industry must also be split into two sets of providers that offer service over either a CDMA or GSM air interface exclusively. Viewing the separate market for CDMA service, on the one hand, and the separate market for GSM service, on the other, reveals that AT&T and Verizon Wireless each have dominant positions in their respective air interfaces. Since the roaming market is technology-limited, a CDMA provider cannot feasibly obtain roaming from a GSM carrier, and vice versa. This exacerbates the difficulties that new entrants and small, rural and regional carriers face in negotiating fair roaming agreements, as they are limited by virtue of their network technology as to who they may negotiate roaming agreements with.

With Verizon Wireless' consummation of its acquisition of Alltel, it has nearly 80 million CDMA customers.<sup>21</sup> By comparison, Sprint Nextel, US Cellular, MetroPCS, Leap and other smaller rural and regional CDMA carriers serve only approximately 65 million customers in the aggregate.<sup>22</sup> This means that Verizon Wireless alone serves more than 55 percent of the CDMA market, giving it considerable market power with respect to roaming services. The GSM market is even more concentrated, with AT&T serving over 70 million customers, while its next largest rival, T-Mobile, serves 29 million.<sup>23</sup> This gives AT&T an estimated market share of over 70 percent in the GSM market, allowing it to exercise market power, particularly with respect to the market for roaming services.

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<sup>20</sup> *Id.* at Table 2.

<sup>21</sup> *Id.* at Table A-4.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

**C. The Recent Verizon Wireless-Alltel Merger Eliminated an Important Roaming Partner for Small, Rural and Regional Carriers**

The spectrum positions and national retail footprints of the Big-4 not only require that rural and regional carriers offer nationwide access to their customers to stay competitive, but also act as a disincentive for the Big-4 to enter into fairly-negotiated reciprocal roaming agreements with smaller carriers. Because the Big-4 carriers individually possess nationwide, or near-nationwide, spectrum footprints, they have little or no incentive to enter into reciprocal roaming agreements with smaller regional or rural carriers. In essence, smaller carriers find themselves negotiating roaming agreements from a starting position of inherent weakness, holding no spectrum that the Big-4 needs to access in return, and in many cases the Big-4 carriers have every incentive to deny fair roaming service that can cause rural or regional carriers' customers to migrate to their networks. As a result, the Big-4 has no incentive to enter into fairly-negotiated reciprocal roaming arrangements.

The disappearance of Alltel due to its merger with Verizon Wireless significantly impedes the ability of rural and regional carriers to be able to fairly negotiate reciprocal roaming agreements. Alltel, itself a regional carrier with a large spectrum footprint, was a valuable ally and negotiating partner for other rural and regional carriers. Alltel had a strong incentive to negotiate fair reciprocal roaming agreements, as they, like the rural and regional carriers with whom they were negotiating roaming agreements, also sought to provide their customers with nationwide wireless access. Indeed, as amply demonstrated in the Verizon-Alltel proceeding, the roaming agreements Alltel reached with rural and other regional carriers were considerably more favorable than those Verizon reached with those same carriers. In a post-Alltel world, this valuable partner has been removed by Verizon Wireless, a large carrier with no incentive whatsoever to provide roaming on just and reasonable terms. In fact, the Commission saw this

as one effect of the merger and conditioned its approval on certain roaming rates and agreements being maintained.<sup>24</sup>

Because new entrants and small, rural and regional carriers compete directly with nationwide carriers, when customers are comparing rates between companies they will consider the rates for both local service as well as roaming use. If small, rural and regional carriers are unable to offer competitive rates for roaming service, they will not only lose prospective customers, but also will lose current customers who flee their service in search of better nationwide rates.<sup>25</sup> The loss of Alltel has meant the significant loss of an important upstream input (*i.e.*, roaming services) supplier. The loss of this critical upstream component has, and will continue to, lead to market failure, with new entrants and small, rural and regional carriers unable to obtain roaming services at reasonable costs, and thus unable to present competitive service offerings to potential and current customers.

Verizon's behavior since the closing of the Verizon-Alltel merger has further frustrated new entrants and small, rural and regional carriers. Despite agreeing to a limited number of concessions as a condition to the Commission approving the merger, since the merger has closed Verizon Wireless has dragged its heels on every voluntarily-agreed-to condition, doing everything in its power to keep from abiding by the spirit of the Commission's directives. Verizon Wireless has attempted to construe all provisions as narrowly, and as greatly in their favor, as possible. For example, there was a clear promise made to abide by all terms of either

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<sup>24</sup> Verizon Wireless continues to demonstrate why these conditions were necessary. At every turn, Verizon Wireless has attempted to avoid or obfuscate the voluntary roaming commitments it agreed to as conditions to its acquisition of Alltel.

<sup>25</sup> Many carriers cannot compete without offering nationwide roaming. If the rates for such roaming are excessive, it causes these companies to be economically weakened and potential targets for additional consolidation.

an Alltel or a Verizon Wireless roaming agreement, at the roaming carrier's sole discretion, for a period of four years.<sup>26</sup> Now, however, Verizon Wireless claims that it only agreed to the narrowest possible interpretation of that provision, and that the timeframe applies *only* to roaming rates.<sup>27</sup> As other small, rural and regional carriers have noted, “[e]very day Verizon’s self-indulgent interpretation of its commitment causes real harm to real consumers on the ground.”<sup>28</sup> Every day that Verizon Wireless refuses to honor the commitments it made to the Commission is another day lost on the agreed-upon four-year term, and another day during which customers or rural and regional carriers are denied the reasonable roaming services that they rightly deserve.

**D. Exclusive Handset Agreements Strengthen the Market Power That the Big-4 Possess Over the Market for Wireless Services**

Exclusive handset arrangements force consumers to buy services and accessories from a particular wireless provider if they want the newest exclusive phone that is sold by only that provider. This tying of products and service is problematic. The lack of availability of particular handsets to all customers has the practical effect of limiting competition, especially from small, rural and regional carriers and new entrants, since such carriers are forced to offer handsets to consumers that may not provide as much functionality as those offered by the Big-4.

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<sup>26</sup> To persuade the Commission to approve the merger, Verizon stated that “[t]he merger will either leave the existing roaming terms available from Verizon Wireless and ALLTEL unchanged, or at the voluntary election of certain parties, *improve* available terms.” *Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, Joint Opposition to Petitions to Deny and Comments*, WT Docket No. 08-95 (filed August 19, 2008) (emphasis in original).

<sup>27</sup> As MetroPCS has pointed out in other filings, such a reading is absurd, as service rates without terms is a meaningless agreement.

<sup>28</sup> *Ex Parte Letter from James H. Barker, Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC and Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket Nos. 08-95 and 05-265 (filed May 19, 2009).

Furthermore, exclusivity agreements allow carriers who have market power in the provision of wireless services to extend that power into the handset market by tying the purchase of the newest handsets to the purchase of its service for an extended period of time.<sup>29</sup>

The accelerating consolidation in the wireless industry enhances the ability of the Big-4 carriers to enter into and to dictate the terms of handset exclusivity arrangements and, as exclusive arrangements proliferate, smaller carriers may be unable to procure handsets that comply with various Commission mandates, including hearing-aid compatibility requirements and any additional E911 requirements.

The Commission has a congressionally-mandated policy objective of spurring competition in the form of new entrants, creating diversity of ownership of FCC licensees and of increasing the availability of wireless service across rural America.<sup>30</sup> New entrants and small, rural and regional carriers do not have access to exclusive arrangements and as such are hindered when they are competing with the larger carriers who do. The Big-4 carriers already have greater resources, greater spectrum, and larger roaming footprints when they compete against small, regional or rural carriers. These exclusive agreements are an additional rock in the small carrier's backpack that weighs them down in their competitive fight with the Big-4. Moreover, such exclusivity arrangements can hinder broadband deployment if the large carriers dictate exclusive arrangements on a new generation of handsets, like long term evolution ("LTE").

Rather than allowing the largest carriers to extend their already substantial competitive

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<sup>29</sup> As MetroPCS has pointed out previously, the Big-4 carriers are receiving an ever increasing amount of customers *solely* as a result of this exclusive access to such handsets. For example, in the first quarter of 2009, 70% of AT&T's net gains were as a result of iPhone activations. See Peter Burrows, "AT&T's iPhone Dilemma," *Businessweek*, available at [http://www.businessweek.com/technology/content/apr2009/tc20090429\\_594307.htm](http://www.businessweek.com/technology/content/apr2009/tc20090429_594307.htm) (last visited Jun. 12, 2009).

<sup>30</sup> 47 U.S.C. §§ 257, 332.

advantage over small, rural, and regional carriers, the Commission should immediately initiate a rulemaking, as proposed by the Rural Cellular Association,<sup>31</sup> to investigate the negative effects of such exclusivity arrangements, and, if necessary, adopt rules that prohibit such arrangements between the large national carriers and handset and data card manufacturers, especially as they relate to new technologies, such as LTE.

## **II. TO PROMOTE COMPETITION, THE COMMISSION MUST ELIMINATE THE IN-MARKET ROAMING EXCEPTION AND PROVIDE FOR AUTOMATIC DATA ROAMING**

Wireless carriers are increasingly competing on a national scale. CMRS customers are by definition a mobile group, and accordingly, they expect their wireless handsets – and the concomitant wireless service that powers those handsets – to travel with them outside of their local metropolitan area. Consumers do not, and should not be expected to, understand the intricacies of Commission roaming regulations. Consumers should not have to discover that their wireless phones may suddenly stop functioning in certain markets, perhaps at times when they may need them most. Chairman Copps perhaps said it best when he stated, “Consumers should not have to be amateur engineers or telecom lawyers to figure out which mobile services they can expect to work when they travel.”<sup>32</sup> The full Commission also has noted the importance of ensuring that “consumers’ reasonable expectations of seamless nationwide commercial telephony services through roaming” are met.<sup>33</sup> In addition, the Commission has explicitly

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<sup>31</sup> *Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, Rural Cellular Association, RM-11497 (filed May 22, 2008).

<sup>32</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, statement of Commissioner Michael J. Copps, approving in part, concurring in part, WT Docket No. 05-265 (rel. Aug. 16, 2007) (“*Roaming Order*”).

<sup>33</sup> *Id.* at ¶ 55.

recognized the fundamental fact that that wireless carriers *must* provide their customers with nationwide service in order to compete effectively in today's CMRS marketplace.<sup>34</sup> In light of this realization, it is clear that a competitive wholesale market for roaming services is critical to the health of the retail market for wireless services. The Commission must ensure that all carriers, particularly small, rural and regional carriers who lack a nationwide spectrum footprint, and who may not have the resources to build one if they were somehow able to secure spectrum, have access to automatic roaming on just and reasonable terms in all markets where they do not *currently provide service*, not just in markets where they merely do not hold spectrum.<sup>35</sup>

Because of their abilities to refuse reasonable roaming requests in certain markets through the below-described in-market roaming exception, and to purchase almost all of the spectrum offered by the Commission, the Big-4 are able to deny consumers the choice and increased competition that new entrants and small, rural and regional carriers provide. Consumers thus find themselves at a Morton's Fork, forced to choose between going without the unique pricing plans and services that rural and regional carriers offer or going without important roaming services. Public safety and national security concerns are also implicated with roaming issues. Indeed, one of the core objectives of the Commission's mandate to create a seamless

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<sup>34</sup> *Id.* at ¶ 3, 27-28.

<sup>35</sup> As MetroPCS has pointed out in previous filings, construction requirements are a poor substitute for such efforts, since construction requirements are more likely to hurt small, rural or regional carriers who currently do not have existing facilities, while incumbent wireless carriers can easily add an additional channel to existing facilities. *See* MetroPCS Comments at 29-38 in *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, Former Nextel Communications, Inc. Upper 700 MHz Guard Band License and Revisions to Part 27 of the Commission's Rules, WT Docket No. 06-169, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86, Further Notice of Proposed Rule Making, FCC 07-72 (rel. April 27, 2007).*

nationwide communications network is to promote “national defense” and “safety of life.”<sup>36</sup>

Consumers have grown accustomed to using their wireless devices in emergencies, and may be shocked to find that their devices will not work when they need them most. There can be no doubt that public safety is enhanced when consumers are able to place a call from whatever market they may travel to.

Data services also are becoming an increasingly important part of consumers’ expectations for wireless services. Customers now simply expect that their carrier will provide a bundled plan that includes both voice and data service, including SMS, both within their home area, as well as in other markets when they travel. Without automatic data roaming, small, rural and regional carriers find themselves unable to provide this expected and necessary service to their customers, and as a result are prohibited from truly competing against the Big-4. The Commission must act now to both eliminate the in-market roaming exception and extend data roaming rights on a reasonable and non-discriminatory basis to all wireless carriers.

**A. The Commission Must Abandon the In-Market Roaming Exception**

The Commission has correctly stated that automatic roaming is an essential ingredient in the provision of wireless services, and has found that all carriers have an obligation under Section 201(a) of the Communications Act of 1934, as amended (the “Act”), to provide automatic roaming upon reasonable request.<sup>37</sup> However, the Commission has thus far refused to apply this logic to in-market roaming. The Commission has held that, if a carrier requesting automatic roaming services (the “Requesting Carrier”) holds or has access through leasing agreements to spectrum in an area where it is requesting such roaming services, the carrier to

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<sup>36</sup> 47 U.S.C. § 151.

<sup>37</sup> 47 U.S.C. § 201(a).

which it makes the request (the “Supplying Carrier”) may treat the request as *per se* unreasonable, and freely deny it.<sup>38</sup> Mysteriously, this in-market exception applies even in cases where it was impossible for any number of technical or financial reasons for the Requesting Carrier to have constructed the facilities necessary to actually serve customers on the spectrum it holds, and would apply even where the Requesting Carrier has met *every* construction obligation imposed by the Commission.

In the *Roaming Order*, the Commission declared that automatic roaming was a common carrier service,<sup>39</sup> and therefore the Commission must provide a reasoned justification for excluding in-market roaming from this definition. The Commission’s vague and unsupported hope that the in-market roaming exception will somehow promote facilities-based competition does not nearly rise to the level of reasoning necessary to ignore the clear mandate with respect to roaming found in Section 201(a) of the Act. The *Roaming Order’s* public interest analysis as to in-market roaming is also flawed. Rather than promoting facilities-based competition in the wireless marketplace, as the Commission has suggested, it merely enables the Big-4 to deny objectively reasonable roaming requests and “freeze out” new entrants and disruptive competitors and to pry customers away from small, rural and regional carriers, to the ultimate detriment of wireless consumers.

As noted above, roaming services are an essential ingredient required by all small, rural and regional CMRS carriers and new entrants in order to provide a truly competitive service offering to their customers. In the market for wireless services, such providers are forced to compete with the Big-4, all of whom boast a nationwide service footprint and bundled offerings

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<sup>38</sup> *Roaming Order* at ¶ 48-50.

<sup>39</sup> *Id.* at ¶ 23-28.

for national voice and data services, and several of which obtained such footprints without having to pay for them via spectrum auctions. In order to compete effectively, new entrants and small, rural and regional carriers simply must be able to offer their customers the ability to roam outside of their home network area at a reasonable rate.<sup>40</sup> Customers are unwilling to lose the ability to use their wireless handset – despite the fact that there are no technological barriers to its use – each time that they travel, or, in the alternative, pay exorbitant fees to roam on competing networks. Any unjust roaming rates charged by the Big-4 are ultimately paid by consumers, either directly or as a consequence of paying higher prices due to the increased costs of new entrants, small, rural and regional carriers providing service or to driving such carriers entirely out of business – or into forced mergers.

Admittedly, there is a certain logic that underlies the in-market roaming exception. Wireless service providers should not be forced to provide roaming access to competing carriers who have the option of providing service in the same market over their own facilities. This is where the logic ends, however, as the in-market roaming exception inexplicably encompasses both built and unbuilt spectrum. Having naked spectrum does not allow a carrier to serve customers over it, and therefore the Requesting Carrier has no true ability to provide service on its own. The Commission has posited that allowing automatic roaming on just and reasonable terms in markets where a competing carrier holds unbuilt spectrum will act as a disincentive for that carrier to engage in an aggressive buildout schedule in order to compete over their own facilities.<sup>41</sup> In fact, the opposite is true. Forcing new entrants and small, rural and regional

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<sup>40</sup> These carriers are not requesting a free ride – rather they are willing to pay a *fair* price for the service. Since such services would help to defray a Supplying Carrier's costs, such refusals are clearly anticompetitive.

<sup>41</sup> *Roaming Order* at ¶ 49.

carriers to choose between automatic roaming and purchasing additional spectrum on which to build their own facilities offers little incentive for such carriers to add to their own spectrum portfolio, as doing so means that they will bear significantly increased roaming costs (or complete denial of service) for the many years it may take to complete network construction. Additionally, because the Requesting Carrier is required to pay a roaming rate that includes profit for the Supplying Carrier, the Requesting Carrier will always be incented to build its own competing network on which it can supply its own roaming at a lower cost.

The Commission recognizes that constructing a wireless network is a complex, costly and time-consuming process. This realization is codified in the Commission's rules regarding construction requirements for wireless spectrum. If it were as easy to build a wireless network as the in-market roaming exception leads one to believe, the Commission's construction deadlines would be weeks or months – not the four, five, ten or more years that they are. The in-market roaming exception also does not take into account the frequently-necessary step of moving incumbent users off of newly-licensed spectrum. Oftentimes rural and regional carriers may have purchased spectrum, and planned an aggressive construction schedule, yet may be held up by negotiating the movement of incumbent licensees off of the spectrum. Such a carrier has then lost the benefit of automatic roaming at the time of license grant, and yet is unable to construct its own facilities on a timeframe that meets their economic and business needs.

The in-market roaming exception also hinders the implementation of new or unique service models. Certain providers may have a business model by which they focus first on metropolitan areas to build a customer base with low-cost service, gradually expanding outward in the market to serve less populated areas. Given the large geographic area covered by most spectrum licenses acquired in recent auctions – in many cases, at the behest of the larger carriers

– such a carrier will not receive the benefit of automatic roaming while they expand their network, despite the fact they are unable to offer service on their outlying unbuilt spectrum. The simple truth is that the in-market roaming exception does not operate as intended, and instead serves as a tool for the Big-4 to refuse roaming to new entrants, small, rural and regional carriers, harming their ability to compete for customers and finance the construction of their own wireless networks, leading to an end result that is the exact opposite of what the Commission intended. The Commission should act immediately to rectify this problem by granting the MetroPCS *Petition for Reconsideration* filed in the roaming proceeding.<sup>42</sup>

**B. All Carriers Must Be Required to Provide Automatic Data Roaming Services**

CMRS consumers consider data service an increasingly indispensable part of their wireless consumption. The Commission has reported that “37 percent of U.S. mobile subscribers paid access to the mobile Internet in the first quarter of 2008...and that the number of U.S. subscribers who paid for mobile Internet access increased 28 percent between the first quarter of 2007 and the first quarter of 2008.”<sup>43</sup> Such an increase has been fueled in no small part by the explosion of Internet- and data-ready smartphones on the consumer handset market, phones like Apple’s iPhone and the G1, designed by Google. Customers who purchase smartphones of this ilk view data as an integral part of their wireless service, and expect that data service, like voice service, will travel with them wherever they go. This expectation, however, will not be met until the Commission provides for rules requiring all carriers to provide automatic data roaming at just and reasonable rates.

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<sup>42</sup> See *MetroPCS Communications, Inc., Petition for Reconsideration*, WT Docket No. 05-265 (filed October 1, 2007).

<sup>43</sup> *Thirteenth Report* at ¶ 201

The Commission’s congressional mandate of “mak[ing] available, so far as possible, to all people of the United States...a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges”<sup>44</sup> extends to *all* communications services, not just to voice and SMS as the Commission has found. Section 1 of the Act not only authorizes a Commission finding that automatic roaming applies to data, but in fact compels such automatic data roaming by its plain language. Just as the Commission determined that nationwide roaming was a requirement for a CMRS carrier to effectively compete,<sup>45</sup> the Commission must now recognize that data service is so integral to CMRS service that nationwide data roaming is required for rural and regional carriers to effectively compete.<sup>46</sup> Over the past few years, mobile data access has become so ingrained in consumer expectations of CMRS service, that denying nationwide data roaming is as damaging to competition now as denying nation voice roaming would have been at the time that Commission released the *Roaming Order*.<sup>47</sup>

Further, automatic data roaming should not merely be limited to existing wireless technologies. The Commission must make certain that any automatic data roaming rule applies to both current *and* future technologies in order to fulfill its mandate of ensuring that all Americans have access to cutting edge wireless technologies on a nationwide scale. This is particularly important in light of the coming deployment of LTE data services, estimated to

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<sup>44</sup> 47 U.S.C. § 151.

<sup>45</sup> *Roaming Order* at ¶¶ 3, 27-28.

<sup>46</sup> One of the issues left open in the recent reconsideration of the automatic roaming item is data roaming at speeds less than broadband speeds. Since such data generally acts as the fall-back for data services, it needs to be included as well.

<sup>47</sup> In the *Thirteenth Report*, the Commission reported that Internet use via mobile broadband increased by 154 percent in 2007, and U.S. mobile subscribers with 3G-enabled devices grew 80 percent between mid-2007 and mid-2008. *Thirteenth Report* at ¶¶ 205-06.

arrive in late 2009 or early 2010. LTE represents the latest in high-speed data access, and in order for this important new technology to have any value to rural and regional carriers, the Commission must extend automatic data roaming to LTE and other future high-speed data innovations.

Similar to the in-market roaming exception, potential customers of new entrants and small, rural and regional carriers again are faced with a disappointing dilemma, given the choice between the unique service and pricing options offered by these carriers and the ability to access data service outside of their home markets. This harms the ability of these carriers to compete, as the lack of automatic data roaming forces these carriers to put forth an “incomplete” service offering to their customers, as compared to the Big-4 who all possess the ability to offer data roaming nationwide over their own spectrum. In order to create a truly competitive CMRS marketplace, the Commission must require automatic data roaming, and allow new entrants, small, rural and regional carriers to compete on an even playing field for *all* wireless services. Consequently, the Commission should act pursuant to the current record compiled in response to the data roaming *Further Notice of Proposed Rulemaking*.<sup>48</sup>

### **III. THE COMMISSION SHOULD CONDUCT A SPECTRUM INVENTORY WITH THE GOAL OF PROVIDING ADDITIONAL SPECTRUM FOR USE BY CMRS PROVIDERS**

Although the Commission has auctioned off large amounts of spectrum in recent years, much of that spectrum has ended up, one way or the other, in the hands of the Big-4. Without meaningful access to spectrum, new entrants and small, rural and regional carriers will find themselves simply unable to grow. The Commission is itself beginning to recognize the growing

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<sup>48</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817 (Aug. 16, 2007).

spectrum availability problem. In fact, in the context of wireless broadband, Chairman Copps recently recognized the “lack of available, affordable and suitable spectrum.”<sup>49</sup> The identifiable inventory of spectrum suitable for broadband commercial use is scant. Only 20 MHz of paired spectrum suitable for broadband wireless services remains (*i.e.*, the 700 MHz D-Block and the AWS-2 J Block) and the Commission is actively considering proposals that would eliminate the J Block in order to foster a nationwide broadband Internet service in the AWS-3 band. In order to address this need for more spectrum, Chairman Copps has recommended that the Commission “conduct a thorough inventory of the spectrum it has already licensed, examining, how, why and where it is used, and identifying distinct geographic areas where service has not been deployed or where spectrum is being used inefficiently.”<sup>50</sup> MetroPCS agrees that such a spectrum inventory should occur, and that such an inventory should begin immediately. Once this spectrum inventory has been conducted, the Commission should take steps to make spectrum that is being warehoused or severely underused available to all CMRS providers, in a manner that the Commission believes will promote “more efficient use”<sup>51</sup> of underused spectrum and spur competition in the industry.

When conducting this spectrum inventory, the Commission should consider the extent to which carriers have used the spectrum leasing rules to let third-parties help licensees preserve spectrum that is not being put to serious use. The Commission’s rules regarding construction requirements for leased spectrum create a serious warehousing problem. Under the

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<sup>49</sup> Chairman Michael J. Copps, *Bringing Rural Broadband to America: Report on a Rural Broadband Strategy*, Federal Communications Commission, ¶ 149 (May 22, 2009), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-291012A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291012A1.pdf) (last visited May 28, 2009) (“*Rural Broadband Report*”).

<sup>50</sup> *Id.* at ¶ 50.

<sup>51</sup> *Id.*

Commission's rules, when spectrum is leased from one carrier to another, the lessor carrier is permitted to take advantage of the construction performed by the lessee carrier to satisfy lessor carrier's Commission-mandated construction deadlines. Ordinarily, this raises no issues, as it satisfies the Commission's goal of encouraging facilities construction and efficient use of spectrum. The leasing rules, however, also create an unfortunate potential for carriers with nationwide spectrum footprints to game the system and engage in impermissible spectrum warehousing. This can occur because the Commission's rules permit leased spectrum that is used on an already-constructed network to satisfy the buildout requirements of the lessor carrier. Put simply, by leasing spectrum to a carrier that has existing facilities in that market, a lessor carrier can "build" its network without ever putting a shovel in the ground or serving any additional customers. As far as the Commission is concerned, the spectrum has been built and is in use – though in reality it is merely being warehoused on an already-constructed network. It does not stretch the imagination to presume that certain carriers may be engaged in this practice, with Carrier A agreeing to warehouse spectrum in certain markets where it has existing facilities in exchange for Carrier B agreeing to warehouse Carrier A's spectrum in markets where it has an operational network. In conducting its spectrum inventory, the Commission must be vigilant in identifying situations like the one described above in order to ensure that consumers receive the benefit of the most efficient use of scarce spectrum resources.

Moreover, the Commission should move to allocate spectrum that it currently has available in a manner which promotes the possibility that such spectrum can be fairly obtained by new entrants, small, rural and regional carriers. Both the 700 MHz D block and AWS-2 and -3 spectrum should be allocated as requested previously by MetroPCS in the near term to relieve

the spectrum crunch.<sup>52</sup> The Commission should adopt band plans for this spectrum that are flexible and that encourage broad participation by utilizing small geographic areas. By taking a “building block” approach and offering a sufficient amount of spectrum in small geographic areas, the Commission would permit meaningful participation by a diverse group of carriers – including smaller carriers and prospective and new entrants into the marketplace. In adopting a building block approach, the Commission also would be following its statutory obligation to ensure “an equitable distribution of license and services among geographic areas” and “avoid [] excessive concentration of licenses...by disseminating licenses among a wide variety of applicants...”<sup>53</sup>

#### **IV. CONCLUSION**

In an increasingly concentrated CMRS market, the Commission must focus its efforts on promoting new entry and allowing small, rural and regional carriers to fairly compete, thus improving the wireless experience for all Americans. To do so, the Commission must promulgate regulations ensuring that all carriers have access to voice and data roaming at just and reasonable rates and to the spectrum necessary to carry out their wireless operations and ensure a vibrant and vigorously competitive industry. By requiring that the all carriers provide automatic voice and data roaming services on just and reasonable rates and terms, and by eliminating the in-market roaming exception, the Commission can ensure that the competitive field remains level. Combined with a comprehensive spectrum inventory aimed at increasing the efficient use of wireless spectrum, this will enable new entrants, small, rural and regional carriers

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<sup>52</sup> See *Comments of MetroPCS Communications, Inc.*, WT Docket No. 06-150 (filed Jun. 20, 2008); see also *Comments of MetroPCS Communications, Inc.*, WT Docket Nos. 07-195 and 04-356 (filed Jul. 25, 2008).

<sup>53</sup> 47 U.S.C. § 309(j)(3).

to use their unique service and pricing options to effectively compete for customers that require nationwide mobility.

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