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January 6, 2010

57739-000020

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Reexamination of Roaming Obligations of Commercial Mobile Radio Service
Providers (WT Docket No. 05-265)

Dear Ms. Dortch:

MetroPCS Communications, Inc. (“MetroPCS”) respectfully submits this letter in response to the December 22, 2009 letter of AT&T Inc. (“AT&T”) regarding the Commission’s in-market roaming exception.¹

I. PRELIMINARY STATEMENT

Viewed in its proper context, the AT&T *Ex Parte* amounts to nothing more than a re-hashing of the oft recited and repeatedly rejected arguments AT&T made when it sought (unsuccessfully) to defeat the out-of-market automatic roaming right that was adopted in the *2007 Roaming Order*.² As is discussed in greater detail within, AT&T previously argued that allowing automatic roaming would stifle facility-based competition and dampen the robustly competitive wireless market.³ The Commission properly rejected these arguments. Incredibly, AT&T is now boasting, in direct contradiction to its prior dire predictions, about the “high level of facilities-based competition both before

¹ Letter of Gary L. Phillips and Michael P. Goggin to Marlene H. Dortch, Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265 (filed Dec. 22, 2009) (“AT&T *Ex Parte*”).

² *Reexamination of the Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15187 (Aug. 16, 2007) (“*2007 Roaming Order*”).

³ Comments of Cingular Wireless (now AT&T Inc.), Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WC Docket No. 05-265 (filed Nov. 28, 2005) (“AT&T Comments”).

and after the *2007 Roaming Order*” and the fact that “most Americans can choose from at least five facilities-based carriers and almost all can choose from at least three.”⁴

AT&T now opposes the elimination of the in-market or home roaming exception on the principal ground that “competition and voluntarily negotiated roaming arrangements flourished prior to the *2007 Roaming Order* and continue to flourish today.”⁵ Essentially, AT&T argues that the *status quo* – which includes an in-market roaming exception – is fine, and that therefore no home market roaming obligation is required.⁶ The fatal flaw in AT&T’s argument is obvious. The *2007 Roaming Order* did not abrogate in-market roaming agreements that already were in place when the order was adopted.⁷ In addition, the Commission has placed conditions on recent AT&T and Verizon merger approvals that have mitigated, to some extent, the near term adverse effects of the in-market roaming exclusion.⁸ Thus, to the extent that the negative impacts of the misguided home roaming restriction have not yet been fully felt, it is because of the extraneous factors that effectively have delayed such impacts. Make no mistake about it -- once the current agreements expire and any conditions imposed on Verizon or AT&T lapse -- the Commission can and should expect AT&T and Verizon to refuse to provide any in-market roaming in the absence of a requirement to do so. Indeed, the considerable time and attention devoted by AT&T to its extensive *ex parte* can leave no doubt that AT&T intends to take full advantage of the benefit it receives from the home market roaming restriction.

The simple truth is that the Commission’s willingness to seriously consider an automatic data roaming policy, and the fact that the full impact of the home market roaming exception has not been felt, have played a key role in keeping hope alive for a

⁴ One of the overlooked facts is that the industry looked considerably different in 2007 when the Commission issued the *2007 Roaming Order*. Since then, Dobson Communications, Aloha Spectrum Holdings, SunCom, Rural Cellular Corporation, Centennial and Alltel Corporation have all been consolidated out of existence. Indeed, the big four wireless carriers now have over 90% of the market share as measured by number of subscribers, and AT&T and Verizon Wireless (“Verizon”) now have virtually nationwide networks which eliminate any incentives for them to enter into roaming arrangements.

⁵ AT&T *Ex Parte* at 1.

⁶ Indeed, AT&T’s argument clearly implies that no out-of-market roaming requirement is justified, even though AT&T did not seek reconsideration of, review or otherwise appeal the *2007 Roaming Order*.

⁷ *2007 Roaming Order* at para. 49 (indicating that the in-market roaming exception does not preclude a host carrier from offering home roaming if it chooses to do so).

⁸ *See infra*.

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competitive wireless market place. However, with the industry's continued consolidation and the shift to 4G broadband services, the threat that in-market and data roaming may not be available may have and will continue to deter investment in the wireless industry and potentially eliminate jobs. Just as the Commission rejected the prior efforts of AT&T and Verizon to guaranty their dominance of the wireless industry by prohibiting automatic roaming, the agency should dismiss the latest efforts to preserve the untenable in-market roaming exception.

One notable aspect of the AT&T *Ex Parte* is what it does not say. Absent from the extensive submission is any indication that the home roaming exclusion is legally sustainable. Indeed, certain arguments in the AT&T *Ex Parte* strongly support the MetroPCS position that the Commission restrictions on in-market roaming cannot be sustained. Having concluded in the *2007 Roaming Order* that "automatic roaming is a common carrier service,"⁹ the only possible basis for allowing a host carrier to deny a request for automatic in-market roaming with impunity is that such requests are inherently unreasonable. Yet, AT&T points out that it has roaming agreements with every requesting GSM carrier (small or large) that has requested an agreement, and "[e]ach agreement allows home market roaming."¹⁰ The Commission cannot possibly sustain the conclusion that in-market roaming requests are inherently unreasonable, and thus categorically exempt from Section 201 obligations, when a carrier such as AT&T has uniformly honored such requests.

II. AT&T'S MOTIVES ARE SUSPECT

The AT&T *Ex Parte* repeatedly targets two competitors, MetroPCS and Leap Wireless ("Leap"). This is ironic because MetroPCS and Leap are technologically incompatible with AT&T at present and thus have not requested roaming from AT&T: MetroPCS and Leap are CDMA carriers while AT&T is a GSM carrier. The Commission must ask itself why AT&T is devoting so much time and attention to defeating the efforts of MetroPCS and Leap to secure in-market roaming rights when neither carrier has in the past or is currently pursuing such rights with AT&T and AT&T, by its own statements, already provides in-market roaming to all requesting carriers. Two reasons that come instantly to mind should be quite troubling to the Commission. First, AT&T no doubt recognizes that MetroPCS and Leap will be able to compete even more effectively against AT&T in all segments of its wireless business if they are not hamstrung by the home roaming exemption and are able to receive in-market roaming from Verizon.¹¹ As

⁹ *2007 Roaming Order*, para. 23.

¹⁰ AT&T *Ex Parte* at 7. This demonstrates not only that in-market roaming is inherently reasonable, but also that it is both technically and economically feasible.

¹¹ Moreover, since Alltel generally provided in-market roaming and Verizon is obligated to honor such Alltel agreements for four years, there is no reason for AT&T to choose now to focus on MetroPCS and Leap Wireless, unless it recognizes the extent to which

MetroPCS repeatedly has pointed out, the elimination of the in-market roaming exception is critical to allowing new entrants and rural, small and medium sized carriers compete with the larger nationwide players. Lifting the restriction will be pro-competitive, which explains why AT&T is protesting so much.

Second, AT&T may be attacking MetroPCS and Leap to mask its true target: T-Mobile. The Commission cannot overlook the troubling possibility that AT&T is using MetroPCS and Leap as strawmen, when its true objective is to maintain the option over time to use the in-market roaming exemption to completely and utterly disadvantage its largest GSM competitor, T-Mobile.¹² In this regard, MetroPCS notes that the AT&T *Ex Parte*, while touting AT&T's prior willingness to enter into home roaming agreements with GSM carriers, contains no indication or commitment that it will continue to do so in the future.

III. AT&T'S ARGUMENTS CONCERNING THE ROBUSTNESS OF THE ROAMING SERVICES MARKET ARE INCORRECT

A. The Market for Roaming Services Exhibits Market Failure

AT&T argues that there is "widespread availability of roaming options today" and that such availability is a result of the fact that the "wireless market remains robustly competitive."¹³ It states that such competitive conditions have "ensured ready access to roaming" and that this "high level of competition has ensured the availability of voluntarily negotiated roaming agreements for carriers across the county."¹⁴

These AT&T assertions fail to properly analyze the wireless market. Although the retail mobile wireless marketplace remains quite competitive (despite an alarming trend towards a duopoly), a necessary input to that market – roaming services – is not competitive, and is subject to a virtual duopoly (or even a monopoly, when technology differences are factored in), which, over time, will affect the retail market for wireless services. Many developments make it difficult for new entrants, as well as small, rural and

roaming has enabled MetroPCS and Leap to better compete, particularly since the competition in the unlimited space has expanded to nationwide service areas.

¹² Unlike Leap Wireless or MetroPCS, T-Mobile has licenses covering most of the United States, but has not built out its coverage as extensively as AT&T because it only recently acquired most of these licenses in Auction No. 66 and has had to clear the spectrum. As such, T-Mobile could be severely and adversely affected by the retention of the home market restriction. Further, since T-Mobile currently competes in all segments of AT&T's business, restricting competition by T-Mobile will greatly advantage AT&T.

¹³ AT&T *Ex Parte* at 2-3.

¹⁴ *Id.* at 3-4.

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mid-sized wireless carriers, to obtain critical roaming services which would enable them to provide competitive wireless service offerings to their customers. In particular, the recent disappearance of a number of carriers who had favorable roaming policies as a result of market consolidation has made it much more difficult for new entrants and small, rural and mid-sized carriers to negotiate reciprocal roaming agreements.¹⁵ In effect, consolidation has significantly stifled roaming options, and roaming is an essential input to retail competition. As a consequence, the Commission must examine whether the market for this necessary input is competitive separately from the retail wireless market.

This need is particularly pronounced when the industry is split into two separate sets of providers that offer service exclusively over either a CDMA or GSM air interface. Viewing the separate markets for CDMA service, on the one hand, and for GSM service, on the other, reveals that AT&T¹⁶ and Verizon¹⁷ each have dominant positions in their respective air interfaces. Since at present the roaming market is technology-limited, a CDMA provider gains nothing by obtaining roaming from a GSM carrier, and *vice versa*.¹⁸ This intensifies the difficulties that new entrants and small, rural and mid-sized carriers face in negotiating fair roaming agreements, as they are limited as to who they may exchange roaming traffic with by virtue of their network technology. The market power held by the largest two carriers in their respective air interfaces enables them to dictate both roaming rates and terms – particularly within a carrier’s home area, where such carriers do not have to offer roaming for reasonable rates.¹⁹

¹⁵ Indeed, the merger of Alltel and Verizon resulted in Verizon being required to allow traffic over their combined footprint to be exchanged under the more favorable Alltel roaming agreements for four years.

¹⁶ The GSM market is the most concentrated, as AT&T has 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.

¹⁷ Verizon alone serves more than 55 percent of the CDMA market, giving it considerable market power with respect to roaming services.

¹⁸ Even with the announcements that AT&T and Verizon are moving towards LTE, this situation will remain for some time since it will take a number of years for LTE services to be deployed to the same extent as CDMA/GSM, *if they ever are*. For example, even after a number of years of build-out, AT&T only covers approximately 230 million pops over its 3G networks. Further, there is no assurance that the largest carriers will offer voice services in LTE. Finally, there is currently no clarity on whether Voice over Internet Protocol (VoIP) over broadband services will be considered voice roaming subject to the existing automatic roaming requirements. Thus, this dominance by AT&T and Verizon in their respective technology platforms will continue for the foreseeable future.

¹⁹ MetroPCS notes that it has been successful in negotiating fair roaming agreements when the other party is a similar small, rural or mid-tier company. The problem is that the

AT&T ignores the above evidence while claiming that wireless consolidation over the years has served the public interest. Specifically, AT&T argues that “[w]ith respect to each wireless transaction approved since 2007, the Commission has concluded that the transaction, with or without conditions, served the public interest.”²⁰ This claim is grossly misleading. Roaming has emerged as a major issue in nearly every recent wireless transaction order and several transactions have been approved only with conditions relating to roaming to address harms that otherwise would have resulted from the particular transactions. For instance, in its order approving the Verizon/Alltel transaction,²¹ Verizon, in the face of vociferous opposition, agreed to a number of roaming conditions, including that:

Verizon Wireless voluntarily offers to each regional, small, and/or rural carrier that has a roaming agreement with ALLTEL to keep the rates set forth in that roaming agreement in force for the full term of the agreement . . . that each such regional, small, and/or rural carrier that currently has roaming agreements with both Alltel and Verizon Wireless having the option to select either agreement to govern all roaming traffic between it and post-merger Verizon Wireless . . . [and that Verizon Wireless commits] that it will not adjust upward the rates set forth in ALLTEL’s existing agreements with each regional, small and/or rural carrier for the full term of the agreement or for four years from the closing date, which ever occurs later.²²

The Commission specifically stated that it conditioned its approval of the transaction upon these conditions which, along with other conditions, it considered were “sufficient to prevent the significant competitive harm that this transaction would likely cause in certain geographic markets.”²³

largest carriers choose not to negotiate such agreements even though there is no technical incompatibility or economic infeasibility. This demonstrates that they are willing to use their market power to cripple competition.

²⁰ AT&T *Ex Parte* at 4.

²¹ *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).

²² *Id.* at para. 178.

²³ *Id.* at para. 179.

Similarly, in its recent order granting the AT&T/Centennial transaction,²⁴ the Commission again conditioned its approval upon a number of roaming conditions, including AT&T's commitment that it honor Centennial's existing agreements with other carriers to obtain roaming services on "Centennial's network pursuant to the rates, terms and conditions contained in Centennial's roaming agreements on the date the AT&T-Centennial merger closes or the full term of those agreements, notwithstanding any change of control or termination for convenience provisions in those agreements," among other conditions.²⁵ The Commission again stated that such roaming commitments were "sufficient to prevent competitive harm that this transaction would likely cause in certain geographic markets."²⁶ These explicit roaming conditions placed on recent proposed consolidations completely contradict AT&T's statement that the Commission found that the recent wireless merger transactions, "with or without conditions, served the public interest."²⁷

AT&T also ignores the fact that, by virtue of the recently approved consolidations, the market power of the two largest carriers has increased, necessitating an even greater need for Commission action. This clearly demonstrates that although the market may not have required in-market roaming rights in the past, the current dynamics of the industry require such rights today.²⁸

²⁴ *Applications of AT&T Inc. and Centennial Communications Corp. 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. 08-246, FCC 09-97 (rel. Nov. 5, 2009).

²⁵ *Id.* at para. 129.

²⁶ *Id.* at para. 130.

²⁷ AT&T *Ex Parte* at 4.

²⁸ Another significant problem with the in-market roaming limitation is that wireless systems have been licensed over time over vastly different market areas (*e.g.*, RSAs, MTAs, MSAs, CMAs, EAs, BTAs, REAGs, etc). Not surprisingly, this has resulted in a variety of network configurations. It might be easy for two carriers to distinguish in-market and out-of-market calls if their respective networks were neat overlays of one another serving equivalent areas. Since that is not the case, the mechanics of implementing a roaming agreement that distinguishes between in-market and out-of-market calls are quite complex. This complexity can be used by the larger, more-entrenched carrier to delay or discourage a suitable roaming arrangement. This stalling tactic evaporates when requesting carriers enjoy the same Section 201/202 common carrier roaming rights both in-market and out-of-market.

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Finally, AT&T argues that the rapid growth of Leap and MetroPCS demonstrates that competition is flourishing. However, the growth of MetroPCS and Leap is due in large measure to their decisions to offer a distinguishable product (low cost, fixed price unlimited wireless services) to a mass market largely ignored by the national carriers. The national carriers recently have focused considerable attention on the fixed price, pay-in-advance market – either by making their own flat rate offerings or by supporting the efforts of select MVNOs. The result has been a slower pace of net additions by both MetroPCS and Leap in recent months as the fixed price market has become increasingly nationwide in scope. AT&T certainly should not be able to use the prior success of MetroPCS and Leap to defeat in-market roaming rights under these circumstances. Finally, the fact that Leap and MetroPCS have been able to grow despite the lack of in-market roaming rights does not address how much better non-nationwide competitors might have done had they been given access to national roaming without an in-market exception. Indeed, the market for all services would have experienced more competition if such roaming was available.

The proper analysis is that the market now (not in 2007 or 2008) is so concentrated that the two largest carriers can and do wield substantial power over the retail marketplace through their ability to deny roaming agreements. Thus, while MetroPCS agrees that the market for retail wireless services is fairly competitive (for the moment), the market for a critical input to that market – in-market roaming services – has broken down and requires regulatory intervention: and competition will suffer without Commission action.

B. The Home Market Exception Hinders Competition

AT&T claims that the competitive harms feared by opponents of the in-market exception have not materialized since the exception was adopted in 2007.²⁹ According to AT&T, competition has flourished since August 2007 and, oddly enough, AT&T appears to attribute this success to the in-market roaming exception.³⁰ In truth, many of the fears expressed by MetroPCS and others about the adverse effects of the in-market exception have indeed been realized (and may soon get worse). In addition, AT&T's claim that roaming opportunities are widely available at competitive rates does not reflect marketplace realities.

²⁹ AT&T *Ex Parte* at 4.

³⁰ AT&T fails to mention that nothing actually changed with regards to the in-market exception in 2007. Prior to its adoption of the *2007 Roaming Order*, the Commission did not recognize any automatic roaming as a common carrier service, and thus it is not as if carriers had in-market roaming rights prior to August 2007 that were taken away from them. Basically, carriers did not have such rights prior to August 2007 and they continued not to have such rights post-August 2007.

1. Predictions of the Opponents of an In-Market Exception Are Turning Out to be Correct – And Such Conditions Will Only Worsen in the Future

Contrary to the claim of AT&T, the *2007 Roaming Order* actually has “embolden[ed] the nationwide carriers and empower[ed] them to take even harder lines in roaming negotiations.”³¹ Subsequent to the *2007 Roaming Order*, MetroPCS has pursued several roaming initiatives and has found it to be extremely difficult to negotiate acceptable new roaming arrangements for either voice or data roaming beyond those mandated by merger conditions. The difficulties have been particularly acute in those areas where the FCC declined to acknowledge that MetroPCS has common carrier rights protected by Sections 201 and 202 (e.g. in-market roaming and data roaming). Multiple carriers have taken inflexible hardline stances, and, as discussed in greater detail below, MetroPCS expects carriers to become even more emboldened once existing contracts and transaction-related obligations expire. Nationwide carriers in particular have proposed exorbitantly high rates for in-market roaming and voice and data roaming, to the extent such roaming rights are offered at all.

Properly viewed, AT&T’s filing is a prime example of an incumbent carrier using the in-market exception as “an opportunity to disadvantage the most competitively disruptive carriers the incumbent faces in the market.”³² Throughout its filing, AT&T references, and even trumpets, the successes of Leap and MetroPCS. As earlier noted, even if the Commission eliminates the in-market exception, AT&T will not have to honor any pending roaming requests from either MetroPCS or Leap – because they are not now technically compatible. AT&T appears to be concerned about MetroPCS and/or Leap obtaining in-market roaming rights from another carrier (Verizon) only because AT&T wants to avoid enhanced competition from MetroPCS and Leap.³³ AT&T’s effort to

³¹ AT&T *Ex Parte* at 4.

³² *Id.*

³³ Indeed, at one time companies such as MetroPCS and Leap could compete on the basis of price against the Big-4 carriers due to the fact that they were the only carriers offering all-you-can-eat wireless plans. Now that each of the Big-4 carriers is offering such plans – or are supporting MVNO’s (like Tracfone in the case of Verizon) with low cost nationwide resale arrangements -- it is critical that rural, small and medium-sized carriers are able to obtain roaming in order to compete on a national level. As AT&T repeatedly has argued to the Commission, the marketplace for wireless services is a national market. Indeed, the Commission has explicitly 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. *2007 Roaming Order* at ¶ 3, 27-28. This has been proven further by the success of MVNOs such as Tracfone and Boost Mobile, who are able to offer nationwide coverage due to sweetheart wholesale deals from AT&T and Verizon – at rates neither company would offer to MetroPCS. In continuing to argue

forestall new and innovative choices for consumers should be rejected by the Commission.

The in-market roaming exception also certainly creates “significant barriers to entry and deter[s] the very facilities-based competition sought by the Commission.”³⁴ One unintended consequence of the “in-market” exception has been to deter carriers from seeking licenses to enter new market areas. MetroPCS notes in this regard that the overwhelming majority of licenses offered in the 700 MHz auction were acquired either by AT&T or Verizon. While a number of factors no doubt contributed to this unfortunate further entrenchment of the two dominant nationwide carriers, the Commission cannot overlook the prospect that the potential immediate loss of existing roaming rights caused applicants who might otherwise have purchased spectrum in the auction to decide not to do so, particularly if the purchase would have involved a large license area which could take years to build-out.³⁵

Of necessity, many new entrants and small, rural and mid-sized wireless carriers initiate service on an incremental basis. They focus on building out the most populated areas first to generate an initial customer base and expand service geographically over time to serve less densely populated areas.³⁶ Given the large geographic areas (*e.g.*, REAGs) included in many of the spectrum licenses offered in recent auctions – mostly at the behest of the larger carriers – the customers of a small carrier with an incremental build-out approach will be denied the benefit of automatic roaming throughout a large territory

against in-market roaming rights, AT&T is frustrating MetroPCS’ ability to compete with it on a nationwide basis – which is the sole reason why AT&T is against MetroPCS obtaining such rights. AT&T’s gambit, however, requires Verizon to also refuse to extend in-market roaming. Since AT&T is aware that Verizon is also against in-market roaming, these two carriers are in effect tacitly agreeing to limit competition by refusing in-market roaming.

³⁴ AT&T *Ex Parte* at 5.

³⁵ Additionally, the fact that the purchase of a license would have the effect of denying roaming would have to be taken into account in the purchase price of such license, which would make these licenses less valuable to such new entrants. As a result, the largest carriers were better positioned to acquire these licenses, at prices which may be less than they otherwise would have been required to pay if the market was untainted by the in-market roaming exception. The Commission also should take note that consolidation intensified after Auction No. 73, and that the companies that were consolidated were not significant winners of 700 MHz licenses in that auction.

³⁶ The Big-4 carriers also built their systems on an incremental basis over an extended period of time. These same carriers now want to limit competition by denying the very inputs that allowed them to be successful.

while the small carrier expands its network on an incremental basis.³⁷ In this respect, the in-market roaming exception serves as a tool for the largest carriers to refuse roaming to new entrants, small, rural and mid-sized carriers, harming their ability to compete for customers and finance the construction of their own wireless networks. Properly viewed, the in-market roaming exception actually has the effect of deterring facilities-based competition. This is the exact opposite of what the Commission intended.

Another anomaly of the in-market roaming exception is that carriers who do not invest in additional licenses are better off than those who do. A carrier who buys a license in a new market area must invest to buy the license, invest further to build out the network to meet Commission-imposed construction deadlines and risk losing essential roaming rights. However, if the carrier opts not to invest in a new license area, it gets common carrier roaming rights in that same licensed area subject to the protections of Sections 201 and 202. It is unclear how such a situation stimulates competition, furthers any federal policy, or promotes facilities-based competition.

In sum, there have been tangible harms already from the home roaming exception. If the entire parade of horrors identified by MetroPCS and others has not materialized, the only reason is that the full brunt of the in-market exception has not yet truly been felt. The *2007 Roaming Order* did not nullify already existing contracts between wireless carriers, so certain pre-*2007 Roaming Order* contracts that grant home market roaming rights remain in effect today. Once these contracts end and any merger conditions expire, there is nothing to prevent the nationwide carriers from denying any further in-market roaming rights to requesting carriers.³⁸ Also, the conditions imposed on both Verizon and AT&T in recent transactions have helped postpone more significant harm from occurring due to the in-market roaming exception. Once existing contracts and the transaction-specific obligations of Verizon and AT&T expire, it is virtually certain that this already-bad situation will get substantially worse.

2. The Prior AT&T Roaming Predictions Have Been Proved to be False

The foregoing discussion completely undermines the AT&T argument that developments since 2007 serve to rebut the concerns expressed about the home market roaming exception. The Commission can, however, assess whether the parade of horrors that AT&T predicted came to pass now that automatic roaming (out-of-market)

³⁷ This is further exacerbated by the allocation of licenses in large spectrum blocks (*e.g.*, 20 MHz versus 10 MHz) which requires carriers to purchase more spectrum than they may need.

³⁸ Indeed many carriers have complained that Verizon is renegeing on the roaming commitments it made to secure blessing of the Alltel merger. This bode ill regarding its future intentions.

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is recognized as a common carrier service. Prior to the *2007 Roaming Order*, AT&T and Verizon both fought bitterly against having any roaming rights classified as common carrier obligations and argued that facility-based competition would come to a halt. Ironically, while failing to justify retaining the in-market restriction – the *AT&T Ex Parte* does an exceptional job of demonstrating the positive effects of automatic roaming and debunking the prior dire predictions the dominant carriers made in an effort to avoid automatic roaming obligations altogether.

AT&T repeatedly expressed concerns that carriers would lack the incentive to build their own networks if automatic roaming was recognized to be a common carrier service, stating that “an automatic roaming requirement will undermine the FCC’s goal of encouraging facilities-based service.”³⁹ This concern is completely undermined by actual actions in the marketplace post-2007. The *AT&T Ex Parte* correctly points out that “many smaller facilities-based carriers (such as Leap, MetroPCS, and Cellular South) are growing rapidly. . .”⁴⁰ and that “small and medium-sized carriers, including MetroPCS and Leap, are prospering and increasing the size of their service areas through both build-out and roaming.”⁴¹ AT&T notes that Leap has “transformed [its] service coverage with new market launches and additional cell sites added to expand [its] footprint.”⁴² AT&T also acknowledges that “MetroPCS continues to expand its coverage areas into less populated areas.” Perhaps the most significant AT&T admission in the recent *ex parte* is that MetroPCS continues to build-out its footprint “notwithstanding the fact that its existing roaming arrangements allowed in-market roaming in these areas.”⁴³ These statements confirm that AT&T’s concerns about build-out were wrong in 2005. The similar concerns it is making about the impact of eliminating the in-market roaming exception are equally wrong today. The Commission should not fall prey to AT&T’s faulty predictions, particularly when they are contradicted by actual, real-world evidence.

³⁹ AT&T Comments at 26.

⁴⁰ AT&T *Ex Parte* at 3.

⁴¹ *Id.* at 5.

⁴² *Id.*

⁴³ *Id.* at 6. Given that MetroPCS has continued its aggressive build-out program even with in-market roaming rights accorded through the Verizon merger conditions, the Commission must reject the claim that carriers have no incentives to continue to build if they enjoy in-market roaming rights. Indeed, this development supports what MetroPCS has been saying all along – carriers who purchase licenses have powerful incentives to build them out regardless of roaming rights. This is primarily because it is more economical to deploy acquired licenses and build them out than to purchase services from a competitor at rates that include a profit for such competitor.

AT&T (then Cingular Wireless) also warned in 2005 that “an automatic roaming requirement would interfere with the development and maintenance of innovative rate plans.”⁴⁴ It actually stated that “adoption of an automatic roaming requirement . . . would undermine the foundation for single-rate plans” and would “jeopardiz[e] the viability of single-rate plans.”⁴⁵ These statements also have been completely contradicted by actions in the marketplace since 2007. Each of the Big-4 carriers has adopted nationwide, fixed price all-you-can eat plans in order to compete with the innovative all-you-can-eat plans introduced by MetroPCS and Leap. Indeed, AT&T admits in its recent *ex parte* that carriers have been compelled “to introduce service offerings for every type of wireless customer, from prepaid offerings for light cell phone users at one end of the spectrum to unlimited everything (*e.g.*, calling, text and data) plans and the other end of the spectrum, and countless variation in between.”⁴⁶

In sum, AT&T’s earlier doom and gloom predictions could not have been further from the mark. Rather, AT&T appeared to be willing to use inaccurate scare tactics in an effort to avoid having automatic roaming considered a common carrier service. It now has taken the same approach to avoid the lifting of the in-market roaming exception. The Commission should reject the current AT&T claims just as it rejected its prior efforts to avoid the automatic roaming obligation.

3. Contrary to AT&T’s Statements, Roaming Is Not Widely Available at Competitive Rates

AT&T boldly states that “roaming opportunities continue to be widely available at competitive rates.”⁴⁷ It cites as evidence for this proposition the fact that Leap and MetroPCS recently entered into a nationwide roaming agreement.⁴⁸ It also states that its “own experiences illustrate the success of a market-based approach to roaming,” as each

⁴⁴ AT&T Comments at 22.

⁴⁵ *Id.* at 24.

⁴⁶ AT&T *Ex Parte* at 4. The only thing jeopardized by removing the in-market restrictions is the largest carriers’ ability to extend their supra-competitive position to all segments of the wireless market. Since Verizon has chosen to resell service to Tracfone on an unlimited nationwide basis, the market for unlimited services is now nationwide. Without roaming, the national carriers would have this space to themselves and be able to dictate supra-competitive rates – as well as destroy the last vestiges of competition in the wireless industry for carriers other than the national carriers.

⁴⁷ *Id.* at 6.

⁴⁸ *Id.*

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of its agreements “allows home market roaming and none discriminate through price or otherwise against roaming inside the carrier’s licensed service area.”⁴⁹

The Commission cannot take seriously the argument that the ability of MetroPCS and Leap to reach a roaming agreement proves that no further regulatory action is necessary. Neither MetroPCS nor Leap is a nationwide carrier, and their footprints cover substantially different areas of the county. In addition, neither MetroPCS nor Leap has market power in the market for roaming services, so their transaction was negotiated at arms-length. MetroPCS and Leap needed each other and received reciprocal benefits from the roaming agreement. This is vastly different from the situation where a smaller carrier is negotiating with a nationwide carrier whose coverage area encompasses the smaller carrier’s entire market. The fact that MetroPCS and Leap were able to enter into a mutually acceptable voluntary agreement proves only that the conditions that used to exist in the CMRS marketplace -- where no one carrier had nationwide coverage -- actually promoted roaming agreements. In fact, the ability of MetroPCS and Leap to enter into an agreement with one another, while being unable to do so at similar rates with national carriers, proves MetroPCS’ point that the dynamics of the roaming market have changed. The Commission cannot rely on the past to show the way for the future – without a common carrier right to in-market roaming, the national carriers will be free to deny home roaming for all others. The disparity in bargaining power causes the normal market incentive to break down because there is much less reason for the largest carrier to offer a reciprocal roaming agreement to the smaller carrier. This is a primary reason the Commission recognized automatic roaming as a common carrier right in 2007.

While AT&T claims that its many GSM agreements demonstrate the success of a market-based approach to roaming, this statement cannot be credited in light of the numerous carriers who complained about AT&T’s roaming practices in the context of the AT&T/Centennial merger.⁵⁰ These complaints stand in stark contrast to the contentions of AT&T that market-based forces are working in the market for roaming services. In addition, since AT&T does not publish its roaming rates – and has resisted efforts by MetroPCS and others to force disclosure of those rates – it is impossible to tell whether its roaming rates actually are reasonable and nondiscriminatory. In all likelihood, the market for GSM roaming rates is exactly what AT&T determines it to be. Since AT&T

⁴⁹ *Id.* at 7.

⁵⁰ *Applications of AT&T Inc. and Centennial Communications Corp. 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. 08-246, FCC 09-97 at paras. 122-123 (rel. Nov. 5, 2009).

has dominant power in this market, requesting GSM carriers have no where else to go and are forced to do business with it – whether they want to or not.⁵¹

Most importantly, the claim that all of AT&T's roaming agreements allow in-market roaming, and do not discriminate through price or otherwise against roaming inside a carrier's licensed service area, confirms -- contrary to the apparent conclusion in the *2007 Roaming Order* -- that it is not inherently unreasonable to request roaming service within a carrier's home market area. By embracing in-market roaming in its own agreements, AT&T provides persuasive evidence that the Commission should reverse its across-the-board finding that requests for in-market roaming rights may be dismissed categorically by host carriers as unreasonable.

In sum, significant harm has indeed occurred due to the Commission's adoption of the in-market roaming exception in August 2007, and the harm will become more severe in the future without corrective Commission action. Most of AT&T's claims merely rehash the rejected arguments it made when it opposed any form of automatic roaming as a common carrier service – arguments that have been disproven by recent activities in the wireless marketplace. Indeed, the closer one looks at the *AT&T Ex Parte*, the clearer the real reason for its filing becomes – AT&T's effort to undercut companies like MetroPCS, Leap, T-Mobile and others from competing with it on a level, nationwide playing field.

C. The Absence of Section 208 Complaints Does Not Indicate that Market Forces Are Working

AT&T suggests that “[t]he complete lack of Section 208 complaints since the adoption of the *2007 Roaming Order* strongly suggests that the market conditions upon which home market roaming proponents base their call for new regulations do not exist” and that “the market is functioning as intended, and regulatory intervention is unnecessary.”⁵² Once again, this contention cannot be taken seriously.

While it may be true that carriers have not yet begun to file Section 208 complaints on roaming, MetroPCS attributes this to a number of circumstances, including that pre-existing agreements still remain in place, the various merger conditions have not lapsed and this area of the law remains in flux and very unsettled. The Verizon roaming

⁵¹ It also suspicious that AT&T is strenuously opposing in-market roaming rights when it claims to universally and voluntarily offer in-market roaming agreements on competitive terms. It appears that either AT&T plans in the future to resist in-market roaming agreements, that none of the carriers (with the exception of T-Mobile) has any footprint in areas AT&T wants to deter competition, or AT&T is against in-market roaming to deter CDMA competition. None of these will serve the public interest.

⁵² *AT&T Ex Parte* at 7-8.

conditions do not expire for three more years (assuming the Commission does not act on the Petitions for Reconsideration requesting that such conditions be extended for an additional three years). There also are numerous petitions for reconsideration pending regarding the Commission's *2007 Roaming Order*, and the Commission has yet to formulate rules on data roaming. There has been substantial lobbying at the Commission on various roaming issues over the past year, and there are reports that the Commission is at least considering taking some action in the near future. In addition, certain carriers, including MetroPCS and Leap, are litigating the scope of the Verizon/Alltel roaming conditions through petitions for reconsideration of the order approving that merger.⁵³ Until these issues and the rules of the game are more settled, it would be premature for a carrier to incur the time and expense required for a Section 208 complaint. In addition, at this point the Commission essentially has held that it is unreasonable to request in-market roaming. Until this finding is overturned, any complaint would have extremely long odds against it. Once the playing field is settled, then there is little doubt that carriers will begin initiating Section 208 complaint proceedings.⁵⁴

Another factor deterring the filing of complaints is the total lack of transparency surrounding what carriers are charging for roaming, which makes the filing of such a complaint extremely difficult given the Commission's exacting complaint requirements. Since carriers generally do not publish or disclose the rates they charge different carriers for roaming, there is no straightforward way for requesting carriers to determine whether the rates they are being offered are reasonable and nondiscriminatory. As MetroPCS has advocated in the past, the Commission should adopt rules that promote transparency with respect to roaming rates. Since automatic roaming is a common carrier service, host carriers are obligated to offer it to all on a nondiscriminatory basis. It is a total anachronism for a common carrier service to be offered on secret terms and conditions. If carriers are able to determine what other carriers are being charged, it would be easier for them to ascertain whether or not they are being treated fairly. At that point, the Section 208 complaint process could become an effective tool to address carrier misconduct. Since AT&T submits that "roaming opportunities continue to be widely

⁵³ See *Celco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, Joint Opposition to Petitions to Deny and Comments*, MetroPCS Communications, Inc. and NTELOS, Inc. Petition for Limited Reconsideration, WT Docket No. 08-95 (Dec. 10, 2008).

⁵⁴ Prior to the release of the *2007 Roaming Order*, roaming agreements generally did not distinguish between in-market and out-of-market roaming. As a result, the prices and terms that exist in many current roaming agreements apply without respect to whether they are in-market or out-of-market. This has exacerbated the problem of bringing a Section 208 complaint, since it is not clear what the non-discriminatory rate would be if a requesting carrier seeks only out-of-market roaming. Although one might conclude that the rates should be lower strictly for out-of-market roaming, other factors such as number of minutes of roaming when roaming is restricted, may play a factor.

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available at competitive rates,”⁵⁵ and that it has had great success with its market-based approach to roaming, then it should have no problem documenting for the public what its roaming rates are, for both in-market and out-of-market services. MetroPCS invites AT&T to make such rates available either on its website, or by filing them with the Commission.

D. Retail Competition is Not Sufficient to Ensure Competitive Roaming Rates

AT&T argues that the Commission has “repeatedly rejected calls for roaming regulation based on alleged harms in a separate, wholesale roaming market, rather than in the wireless retail market, and should do so again here.”⁵⁶ However, AT&T does not even attempt to refute the well documented claims of MetroPCS and others that the wholesale market for roaming services is not competitive and that it has and will impact the retail market for wireless services. Rather, it attempts to seek refuge in the Commission’s prior approaches to roaming issues. In doing so, AT&T mischaracterizes the Commission’s prior actions and refuses to acknowledge changes in the operative circumstances.

As MetroPCS demonstrated above, the market for roaming services is broken, and allows the largest players to engage in anti-competitive activity. The situation has become particularly critical since 2007. As a consequence, the Commission should examine the market for roaming services separately from the retail market for wireless services.

In each merger transaction referenced by AT&T, the Commission has stated that it “will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms) and that are related to the Commission’s responsibilities under the Communications Act and related statutes. We will address the concerns about roaming raised in the record of this transaction in other, more appropriate, proceedings.”⁵⁷ Rather than evidencing Commission disregard for anything other than the retail wireless market, these holdings demonstrate that the Commission considers the best forum to address unresolved roaming issues to be in the ongoing roaming proceeding, rather than in the context of merger-specific proceedings. This means that MetroPCS, Leap, T-Mobile and Sprint clearly are advocating a change of the in-market roaming exception in the right forum. AT&T can take no comfort in the fact that the Commission focused its roaming analysis in its merger decisions on the retail impact of the roaming claims.

⁵⁵ AT&T *Ex Parte* at 6.

⁵⁶ *Id.* at 8.

⁵⁷ See, e.g., *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 at para. 180 (rel. Nov. 10, 2008).

IV. AN IN-MARKET ROAMING REQUIREMENT WOULD NOT DISCOURAGE A CARRIER'S BUILD-OUT INCENTIVES OR BROADBAND DEPLOYMENT – IN EITHER URBAN OR RURAL AREAS

AT&T also argues that a “home roaming obligation would plainly diminish network investment and build-out incentives.”⁵⁸ It submits that “adopting a home roaming requirement would be contrary to FCC policy of encouraging build-out to rural and underserved areas”⁵⁹ and would be contrary to “FCC policy of encouraging facilities-based competition.”⁶⁰ These assertions are not true, which is not surprising since the only “evidence” that AT&T is able to muster to support any of these claims is a line misquoted and misappropriated from an interview with MetroPCS’ CEO, Roger Linnquist. Further, AT&T ignores the fact, apparent in its own build-out decisions, that there are a variety of factors that impact build-out that have nothing to do with whether a carrier has in-market roaming rights.

AT&T cites an article from Forbes (not Fortune, as misstated by AT&T), as indicating that MetroPCS CEO Roger Linnquist is content to let someone else provide coverage in places where demand per cubic meter is low and cost of service is high, like rural areas. AT&T obviously considers this secondhand press report to be quite important since it refers to it not once but twice in its *ex parte* letter.⁶¹ However, for multiple reasons, the isolated passage that AT&T has taken out of context can provide it with no comfort when properly viewed.

Significantly, the portion of the article cited by AT&T does not purport to be a direct quote attributed to Mr. Linnquist, but rather is the characterization by the author, Scott Woolley, of Mr. Linnquist’s view. Mr. Woolley also characterizes the wireless industry as a “cozy oligopoly” in which the Big Four wireless carriers – which include AT&T – have for the past three years been hiking the price of text messages despite the lack of any plausible link to their underlying costs.⁶² Obviously, this latter characterization

⁵⁸ AT&T *Ex Parte* at 8.

⁵⁹ *Id.* at 15.

⁶⁰ *Id.* at 16.

⁶¹ *Id.* at 2, 9.

⁶² Specifically, the article states that collectively the Big Four wireless carriers control 90% of the U.S. market, and “this cozy oligopoly hasn’t succumbed to ruinous price wars – yet. Over the past three years, for instance, the four giants hiked the price of single text messages from 10 cents to 15 cents, and then to 20 cents, despite the lack of any plausible link to their underlying costs.” See Scott Woolley, “The \$10 Phone Bill,” Forbes.com,

completely contradicts the AT&T view that the wireless market is robustly competitive at the retail level. Apparently, AT&T only finds Mr. Woolley's views to be noteworthy when they support AT&T's preconceived notions.

To set the record straight, Mr. Linquist never indicated to Mr. Woolley that a recognition by the FCC of in-market roaming rights would cause it not to build out systems in areas for which it is licensed. What Mr. Linquist did say was that, in areas where the volume density is high, such as the concrete corridors of New York, distributed antenna systems, rather than macro systems, were preferable since they would also satisfy vertical coverage, rather than just horizontal coverage. As MetroPCS has indicated in multiple filings and meetings with the Commission, it only acquires licenses in areas it intends to serve. In larger geographic markets, such as REAGs, the build-out process naturally will take longer, which is one of the reasons that MetroPCS generally advocates smaller (rather than larger) license areas. But, regardless of the market size, MetroPCS has a continuing powerful incentive to build because: (1) MetroPCS will have invested substantial sums to acquire license rights at auction for a market price and needs to earn a return on that investment; (2) because its overall cost structure is significantly lower than those of the nationwide carriers, MetroPCS will profit more by building out areas, even areas outside of the major metropolitan areas, than it will by paying other carriers a roaming rate that recoups both their higher costs plus a profit; and (3) acquiring licenses and building out systems enables MetroPCS to establish a market presence and actively market retail services in such areas – something that roaming agreements generally do not permit.

These points are conclusively demonstrated by the impressive track record of MetroPCS in rapidly building out new markets, and continually expanding coverage in long-licensed markets. This record of pursuing facilities-based competition has continued long after all applicable construction requirements have been met and during times when MetroPCS has enjoyed in-market roaming rights. Indeed, when MetroPCS has been able to acquire smaller geographic areas which better correlate to near term demand, MetroPCS often has build out initial systems serving in excess of 80-90% of the population of the licensed area on the date service was initially launched. The plain truth is that MetroPCS' build-out decisions have nothing to do with roaming rights – but instead have to do with consumer demands, incremental capital requirements and MetroPCS' ability to sell its services in the area.

AT&T actually acknowledges and confirms that MetroPCS “continues to expand its coverage areas into ‘less populated areas notwithstanding the fact that its existing roaming arrangements allowed in-market roaming in these areas.’”⁶³ Indeed, AT&T references the fact that many “smaller facilities-based carriers (such as Leap, MetroPCS and Cellular South) are growing rapidly.”⁶⁴ And MetroPCS will continue to build-out its existing markets, including rural areas, as it has done since its inception, generally without regard to any roaming rights it does or does not have in a particular area. MetroPCS continues to build-out because, after paying a market price to acquire spectrum, the only economically reasonable thing to do is turn it into income producing property and to increase the area in which it sells services.

Notably, AT&T has failed to provide credible evidence that a carrier loses its incentive to build license areas acquired for a market price if it has access to in-market roaming rights. As noted above, AT&T made a similar argument years ago that carriers would not have an incentive to build if they obtained out-of-market roaming rights – an argument that has definitively been proven false. The Commission should not give this disproven argument any greater credence the second time around.

A. Considerations that Have Nothing to do With In-Market Roaming Rights May Affect a Carrier’s Build-out

AT&T claims that economists consider in-market roaming rights to discourage build-out and broadband deployment and to undermine the incentives of carriers to make their own network investments.⁶⁵ However, the Commission bias in favor of facility-based competition – with which MetroPCS agrees – should not be misconstrued to mean that the public interest will be best served if every licensed carrier builds out every inch of territory licensed to it. Some market areas are so sparsely populated that they cannot economically support another network. Although the introduction of the second, third or fourth facility-based competitor may have public interest benefits, the arrival of the fifth or sixth carrier may indeed present diminishing returns, particularly in a sparsely populated area that will not support the investment. At some point, there is a wasteful duplication of facilities that can be detrimental to all consumers who are forced to pay for such inefficiency.⁶⁶

⁶³ AT&T *Ex Parte* at 6.

⁶⁴ *Id.* at 3.

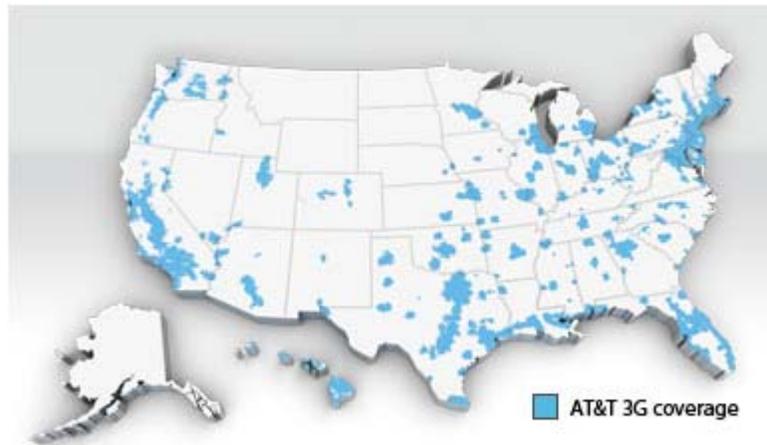
⁶⁵ *Id.* at 10.

⁶⁶ MetroPCS conducts demographic and competitive market analyses before it enters an auction and does not seek to acquire licenses which will not support an additional carrier.

Moreover, some carriers have specialized business plans that serve niche audiences and are not well-suited to all market areas. The Commission's policies should foster a variety of business plans and encourage new entrants to develop innovative services for niche markets. Penalizing specialized carriers by denying their customers automatic roaming rights in unbuilt overlap areas is an ill-advised "one-size-fits-all" approach that mistakenly presumes that ubiquitous network coverage is the only desirable business plan, or that such business plans do not serve the public interest.

Further, requiring build-out may deter optimal broadband deployment since a carrier faced with a loss of voice roaming rights might be forced to provide voice service in the newly licensed area, when other services might better service the public. The current in-market roaming requirement does not distinguish between a carrier who refuses to build versus a carrier who is awaiting new technology or advanced services before building out its licenses. Indeed, the current rule could force carriers to deploy antiquated voice services on spectrum that could be used for advanced broadband services.

One thing is clear: no carrier covers all of the area it is licensed to serve.⁶⁷ For instance, as anyone with a television or an iPhone knows, while AT&T holds licenses that cover virtually the entire U.S., AT&T's 3G coverage is not nationwide. Indeed, the map prominently featured in the Verizon "there is a map for that" ads demonstrates that there are vast areas of the country for which AT&T has not built-out 3G facilities:⁶⁸



⁶⁷ The fact that no carrier covers 100% of its licensed territory conclusively establishes that any sunset provision that causes in-market roaming to be lost at a future date will result in consumers losing roaming coverage. This does not serve the public interest.

⁶⁸ See <http://phones.verizonwireless.com/3g/imgs/attmap.jpg>. In a recent advertisement, AT&T admits that its 3G coverage is only available to approximately 230 million pops. See AT&T advertisement at 8:30 Central, WDFW, Fox.

Clearly, AT&T has sufficient spectrum to build out its 3G network. A study by consulting firm Arthur D. Little says AT&T has a national average of roughly 96 MHz of spectrum.⁶⁹ For example, AT&T (as Cingular AWS, LLC) spent over \$1.3 billion in Auction No. 66 on spectrum covering nearly 200 million people,⁷⁰ and spent over \$6.5 billion in the 700 MHz auction.⁷¹ Yet, there is no evidence that AT&T has made any substantial progress in building out this spectrum. Obviously, in-market roaming rights are not discouraging AT&T from building out its 3G network. So, there must be some other reason that has caused AT&T not to build-out its 3G network nationwide even though it has sufficient spectrum to do so. Presumably, AT&T would say that it is meeting all Commission requirements and serving the public interest. This makes the point that there are Commission imperatives other than system construction that merit consideration.

Indeed, this shows the distortion caused by the current rules. The Commission adopted construction requirements to ensure spectrum is deployed and used. Now, the major carriers are seeking to use the in-market roaming exception as an additional build-out requirement. This makes it a sword which is being wielded against smaller carriers. Since the largest carriers are the ones with the ability and the resources to build-out everywhere – and the large carriers have the most under-developed spectrum -- they, not the smaller carriers, should be the ones made subject to regulatory actions designed to cause them to cover 100% of the market. It is absurd to suggest that facilities-based competition be carried on the back of the smallest carriers when the largest ones do not provide ubiquitous coverage, even though they have the spectrum and resources to do so.

B. A Home Roaming Requirement Would Not Diminish Broadband Deployment

AT&T argues that a “home roaming obligation would disincent build-out and undermine the Commission’s longstanding goal of deploying new wireless infrastructure capable of delivering broadband service across the entire county.”⁷² Yet, the fact is that MetroPCS – which at present enjoys home roaming nationwide – is one of the first

⁶⁹ “FCC Planning to Wrest TV Spectrum for Mobile Broadband,” Yahoo.com (Dec. 23, 2009) available at http://news.yahoo.com/s/ibd/20091223/bs_ibd_ibd/20091223tech.

⁷⁰ See Top Bidders, FCC Auction, Summary, Auction 66, available at http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=66.

⁷¹ “Auction of 700 MHz Band Licenses Closes,” Public Notice, DA 08-595 (Mar. 20, 2008), available at <http://wireless.fcc.gov/auctions/default.htm?job=release&id=72&y=2008>.

⁷² AT&T *Ex Parte* at 12.

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wireless carriers in the country to announce the build-out plans for its 4G network. With its broadband Long Term Evolution (“LTE”) initiative, MetroPCS will provide consumers with an enhanced opportunity to “cut-the-cord” on the Internet, with a richer HTML browsing experience and multimedia applications directly on the subscriber’s wireless handset. MetroPCS anticipates offering 4G LTE services and a dual-mode LTE/CDMA smartphone in its major metropolitan markets in late 2010, and a few months ago announced the vendors the company has selected for its 2010 launch of 4G wireless services.⁷³ MetroPCS has also innovated in the LTE area. MetroPCS has encouraged manufacturers to develop LTE equipment for the PCS/AWS bands when they originally were focusing primarily on 700 MHz. With the cooperation of the manufacturers, MetroPCS will be able to refarm existing spectrum with CDMA adjacent to OFDMA. MetroPCS also has motivated the development of a dual mode CDMA Voice/LTE Data handset. Interestingly, MetroPCS’ plans have MetroPCS deploying LTE before AT&T, and its planned deployment covers a higher percentage of MetroPCS’ current covered pops than the percentage of licensed pops to be covered by the announced Verizon LTE deployment.

If AT&T truly was concerned about ubiquitous broadband deployment, it would drop its opposition to data roaming on just and reasonable terms. Data roaming is a necessity in order for new entrants and small, rural and mid-sized carriers to have sufficient incentive to invest in new broadband technologies. If a customer is unable to receive data when roaming outside of the home market of a non-nationwide carrier, it is unlikely the customer will buy broadband service from that carrier, even if the carrier provides competitive coverage in the local market. This simple restriction will deter new entrants and small, rural and mid-sized carriers from investing in broadband at the exact time such investment is sorely needed to meet the objectives of the national broadband plan and to help the United States pull itself out of the worst recession since the Great Depression. The only way to ensure that broadband investment will occur is to enable all carriers to offer their customers the ability to roam and use these data services, which would allow carriers to recoup their investment in broadband technology. Moreover, allowing data roaming on just and reasonable terms would allow for more competition in the broadband market, which would ultimately benefit consumers. Allowing for data roaming on just and reasonable terms would be just the low-hanging fruit the Commission needs to reach ubiquitous broadband coverage.

⁷³ See MetroPCS *Ex Parte*, A National Broadband Plan for Our Future, GN Docket No. 09-51 (filed Sept. 15, 2009).

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C. The Lack of A Home Roaming Requirement Holds A Greater Risk of Eliminating Jobs

AT&T states that establishing a home roaming requirement would “undermine Congress’s and the Obama Administration’s economic stimulus and job creation objectives.”⁷⁴ Precisely the opposite is the case. Depriving carriers of the in-market roaming rights that will allow their customers to have nationwide coverage would inevitably lead to further industry consolidation which, as AT&T undoubtedly knows from its many acquisitions, would then lead to substantial job losses.⁷⁵

AT&T repeatedly has argued that the market for wireless services is a national one, and the Commission has acknowledged that wireless carriers *must* provide their customers with nationwide service in order to compete effectively in today’s CMRS marketplace.⁷⁶ If carriers are unable to offer their customers nationwide coverage via a combination of build-out, out-of-market roaming and in-market roaming, they will be unable to compete effectively in the marketplace for wireless services. Eventually, some of these carriers will have no choice but to submit to consolidation into another company. Virtually every such merger that has occurred has resulted in streamlining operations as a cost-saving measure. Simply stated: mergers don’t promote job growth, they result in substantial job losses.

The best way for the Commission to promote economic stimulus and job growth is to foster nationwide competition between wireless carriers, to ensure that such carriers are able to compete for consumers on a level playing field. This will allow more carriers to maintain and increase their employment, rather than be forced to be consolidated out of existence.

D. The In-Market Restriction Deters Facilities-Based Competition

One of the unintended consequences of the current in-market roaming exclusion is that, rather than promoting facilities-based competition, the restriction in fact deters it. As an initial matter, the Commission must draw a distinction between those areas where a carrier has a market presence and actively sells retail service and the transient services a customer can receive when they roam outside a carrier’s home area. AT&T naturally confuses the two in an effort to suggest that in-market roaming (e.g., where a customer receives services when outside the network coverage of their home carrier) will deter facilities-based competition (e.g., where a carrier actively markets a competing service). Unlike the situation in the wireline market -- where a carrier can use the facilities of the

⁷⁴ AT&T *Ex Parte* at 14.

⁷⁵ “Job Cuts Planned After AT&T-BellSouth Deal,” msnbc.com (Mar. 7, 2006), *available at* <http://www.msnbc.msn.com/id/11684785/>.

⁷⁶ 2007 *Roaming Order* at ¶ 3, 27-28.

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incumbent local exchange carrier (ILEC) at a cost based rate as part of its network as an alternative to resale -- roaming rights generally do not permit a wireless carrier to actively sell retail service to customers whose homes are in the roaming area. Ignoring this distinction allows AT&T to argue that restricting roaming will promote facilities-based competition. The truth is that roaming agreements do not generally permit the roaming carrier to actively resell the host carrier's services to customers based in the roaming area. Thus, the existence of roaming rights creates no disincentive to build in any area where there is unsatisfied demand. If the in-market roaming restriction has any impact on facility-based competition, it is that it makes a non-nationwide carriers a less serious competitor to a nationwide carrier in those areas where both are built out and competing for customers based there. Viewed in this proper way, it is AT&T who is seeking to hobble its facility-based competitors.

In fact, the in-market roaming prohibition deters facilities-based competition. Under the current rules, a carrier which acquires, or gains access to, spectrum will have no roaming rights in the entire unbuilt area covered by such spectrum. However, a company that decides to forego purchasing spectrum and instead enters the market as a reseller or MVNO selling the network services of another carrier will be legally entitled to do so under Section 201 and 202 of the Communications Act so long as the underlying carrier allows resale to any third party. Since each of the national carriers has entered into resale arrangements, and they are not allowed to discriminate, in effect, such resale is available to any new entrant who wants it. Since a company who acquires spectrum will be required not only to purchase the spectrum (which may come at a significant price, as demonstrated in Auction No. 73), build-out such spectrum to meet the Commission's imposed construction deadlines (which for Auction No. 73 were the most stringent ever imposed), and lose any resale and roaming rights it may have, it should be no surprise that existing carriers and potential new entrants may forgo purchasing spectrum -- and thus not increase facilities-based competition. Of course, the largest carriers are perfectly happy to have smaller carriers and potential new entrants deterred from purchasing spectrum since it will result in less competition and will allow them to acquire the spectrum at a lower price.⁷⁷ The only way you have truly facilities-based competition is when there are more

⁷⁷ Interestingly, both AT&T and Verizon have deterred facility-based competition by entering into resale or MVNO arrangements with companies which otherwise might have bought spectrum and built out their own facilities. For example, Verizon and AT&T both resell services to American Movil which has over 10 million subscribers. Further, Verizon is reselling services to a number of other resellers who are providing unlimited nationwide services. But for these resale arrangements -- which are fostered in part by the Commission's in-market exclusion -- these resellers might have introduced additional facilities-based competition. Thus, taking the AT&T argument to its logical extreme, the Commission should ban resale! Notably, American Movil, a reseller in the mainland United States, provides facilities-based wireless services in Puerto Rico, which leaves little doubt that it could have become a facilities-based carrier absent the attractive resale arrangement it was offered. Of course, Verizon and AT&T prefer resale competitors

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competitors providing service. If the largest carriers are able to purchase all of the spectrum and deter existing small, rural and mid-tier carriers and potential new entrants from acquiring spectrum, the Commission's goals of facilities-based competition will not be served.

In the final analysis, the best way to promote facilities-based competition is to facilitate the purchase of spectrum and its build-out by small, rural and mid-tier carriers and potential new entrants. Rather than use a regulatory stick to force such build-out, the Commission should focus on the benefits carriers receive from acquiring spectrum and building it out. As MetroPCS has amply demonstrated, when small, rural and mid-tier carriers and potential new entrants acquire spectrum, they already have incentives to build it out and provide additional competition. These incentives become even greater if they have the ability to roam in the areas they cannot serve initially.

Contrary to the claim of AT&T, in-market roaming rights actually encourage the requesting carrier to build out its licensed territory more robustly. If a requesting carrier has poor coverage or a dead spot within the theoretical reliable service area of its built-out system, its customers may end up getting served as roamers by the competing carrier which provides in-market roaming. This imposes additional costs on the requesting carrier and creates an economic incentive to improve coverage to eliminate the dead zone. Similarly, in the absence of a home market roaming alternative, a carrier's customers may find they have a sufficient signal in the outskirts of the built-out area to complete a call. However, this call would be captured as a roaming call if there was an in-market roaming agreement with a competing carrier who had superior coverage in this fringe area. Again, the capturing of calls in fringe areas by the carrier providing roaming service will incent the home carrier to expand and improve coverage to avoid losing revenue. Finally, patterns of usage under an in-market roaming agreement enables a home carrier to ascertain that its customers have a bona fide need for extended coverage, thus encouraging the carrier to expand coverage. All things considered, in-market roaming creates incentives, not disincentives, for licensed carriers to build better, more extensive networks.

Given that competition is desirable, the Commission should encourage small, rural and mid-tier carriers and potential new entrants' incentives to purchase spectrum by allowing in-market roaming. Just as roaming fostered the purchase of PCS licenses and the build-out of cellular initially, small, rural and mid-tier carriers and potential new entrants need similar incentives now to do the same.

since they can moderate competition from such resellers by limiting the service packages available, as well as the profit margins for such service. True facilities-based competition is preferable.

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E. A Home Roaming Requirement Would Not Go Against the FCC Policy's Regarding Public Safety and Homeland Security

AT&T's public safety and homeland security arguments are based, yet again, on the false premise that eliminating the in-market exception will inhibit facilities-based build-out. AT&T simply is seeking to avoid competing on a level-playing field with additional nationwide competitors by resorting to scare tactics: Removing the in-market exception will decrease facilities-based build-out! It will eliminate jobs! It will halt broadband deployment! And, finally, it will negatively affect public safety and Homeland Security!

Since there is no basis to conclude that an elimination of the in-market exception will materially decrease the incentives for carriers to build-out in any area where further competition is needed, there is no reason to fear that public safety or Homeland Security will be negatively affected. In reality, it is only if the industry is forced to consolidate further because non-nationwide carriers are unable to compete, and fewer competing carriers are left standing, that public safety and Homeland Security will have something to worry about. At that point their wireless network infrastructure options will be severely limited.

Most important, public safety and national security interests clearly are harmed by the current in-market roaming policy. One of the core objectives of the Commission's mandate to create a seamless nationwide communications network is to promote "national defense" and "safety of life."⁷⁸ It may well be that a customer's greatest need for in-market roaming may be during an emergency.⁷⁹ There can be no doubt that public safety is enhanced when consumers are able to place a call from wherever they may travel. Such concerns would be relieved even further via an elimination of the in-market exception.

It also is unclear how Homeland Security will be benefited by less facilities-based competition driven by the in-market roaming restriction. If the only realistic way for new entrants to compete in the wireless market is through resale arrangement, Homeland Security will not benefit since no additional facilities will be built. However, to the extent that any additional facilities are constructed – even if they do not cover the entire market – Homeland Security is benefited since at least in the area covered by the facilities there are additional choices. A Commission policy that promotes resale rather than the purchase and build-out of spectrum would not promote Homeland Security.

⁷⁸ 47 U.S.C. § 151.

⁷⁹ Not all emergencies rise to the level of an E-911 call. For instance, an emergency could be a mother calling a father to come to the emergency room because their daughter had an accident. Since pay telephones are becoming less and less available, sometimes the only choice is a wireless service.

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V. **THE SOLUTION – THE COMMISSION MUST ELIMINATE THE IN-MARKET ROAMING EXCEPTION**

As MetroPCS previously has noted, the in-market roaming exception should be eliminated outright by the Commission. The Commission must ensure that all carriers, particularly new entrants and small, rural and mid-sized carriers who lack a nationwide spectrum footprint -- and who may not have the resources to build a nationwide network even if they were somehow able to secure spectrum -- have access to automatic roaming on reasonable and non-discriminatory terms in all areas where they do not *currently provide service*, not just in markets where they do not hold spectrum. Roaming services are an essential ingredient and critical input required by all new entrants, and by small, rural and mid-sized CMRS carriers, in order to provide a truly competitive service offering to their customers. These non-nationwide providers are hard pressed to compete in the wireless market with the largest two carriers, both of whom boast a nationwide service footprint and bundled offerings for national voice and data services. In order to compete effectively, new entrants and small, rural and mid-sized carriers simply must be able to offer their customers the ability to roam outside of their home carrier's network area at a reasonable rate.

Instead of adopting an arbitrary, time-capped approach, the Commission should resolve this issue using a flexible and light regulatory approach. The in-market roaming exception should be eliminated and requests for home roaming should be governed by the legal standards established by Sections 201 and 202 of the Act.⁸⁰ This will automatically incorporate a "rule of reason," since a well-established body of law under these statutory sections makes clear that carriers are only obligated to satisfy requests for service that are reasonable.

Kindly refer any questions in connection with this letter to the undersigned.

Respectfully submitted,



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⁸⁰ 47 U.S.C. § § 201 and 202.

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