

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

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

**COMMENTS OF METROPCS COMMUNICATIONS, INC.
ON THE SECOND FURTHER NOTICE OF PROPOSED RULEMAKING**

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MetroPCS Communications, Inc. (“MetroPCS”),¹ by its attorneys, hereby respectfully submits its comments on the *Second Further Notice of Proposed Rulemaking* (“*Second FNPRM*”) released by the Federal Communications Commission (the “FCC” or “Commission”) in the above-captioned proceeding.² MetroPCS supports a requirement that all wireless licensees offering broadband wireless data services be obligated to provide automatic wireless data roaming as a common carrier service under Title II of the Communications Act of 1934, as amended (the “Act”). The following is respectfully shown in support thereof:

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

² *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 25 FCC Rcd 4181 (2010) (“*Second FNPRM*” or “*In-Market Roaming Order*”).

I. INTRODUCTION

In the *Second FNPRM* the Commission seeks comment on whether the roaming obligations of wireless carriers, which were clarified in the *In-Market Roaming Order*,³ should be extended to wireless roaming data services. Specifically, based on record evidence demonstrating the public interest benefits of roaming, the *In-Market Roaming Order* clarified that automatic roaming requirements apply to both the in-market and out-of-market services offered by CMRS carriers that are real-time, interconnected, two-way switched voice or data services, as well as to push-to-talk and text messaging, and that such services should be regulated as common carrier services. In addition, the Commission decided to seek comment in the *Second FNPRM* portion of the order on the legal and policy basis for implementing automatic wireless data roaming. The Commission expressed its desire to “facilitate the provision of services in a manner that provides the greatest benefit to consumers.”⁴ The Commission also noted that broadband deployment is a “key priority for the Commission” and that it “expect[s] that the availability of data roaming services will likely play a major role in the future development of the broadband data market.”⁵ This finding conformed to the *National Broadband Plan*⁶ in which the Commission recognized the importance of data roaming, noting that “[d]ata roaming is important to entry and competition from mobile broadband services and would enable customers to obtain access to e-mail, the Internet and other mobile broadband services outside the geographic regions served by their providers.”⁷ In order to establish a

³ *Id.*

⁴ *Id.* ¶ 50.

⁵ *Id.* ¶¶ 51-52.

⁶ FCC, CONNECTING AMERICA: A NATIONAL BROADBAND PLAN FOR OUR FUTURE (2010) (“*National Broadband Plan*”).

⁷ *Id.* 49.

complete record regarding its authority over data roaming, the Commission elected to seek comment on the nature and extent of its jurisdictional authority to implement automatic wireless data roaming.

II. SUMMARY

As is set forth in detail in these comments, a finding that the Commission has the authority to regulate wireless data roaming as a Title II common carrier service is well within existing precedent and does not require that the Commission adopt any novel or new legal theories. The Commission can regulate wireless data roaming under Title II without overturning or reinterpreting any existing law and precedent and without having to resort to the “*Third Way*.”⁸ Furthermore, for a host of public interest reasons, the Commission should exercise its Title II authority and adopt a rule for wireless data roaming that largely mirrors the voice roaming rule adopted in 2007, and clarified in 2010 – a rule that requires wireless data roaming to be provided as a common carrier service upon reasonable request on just and reasonable terms.

By requiring automatic wireless data roaming, the Commission will achieve several important public interest goals. First, the Commission can enhance competition, innovation and investment, fix a broken wireless data roaming market, and improve public safety and national security, all while moving towards achieving the important goals set forth in the *National Broadband Plan*.⁹ The *National Broadband Plan* properly recognizes the critical need for data roaming in the wireless marketplace, noting that wireless data roaming is “crucial for enabling

⁸ Austin Schlick, Federal Communications Commission, “A Third-Way Legal Framework for Addressing the *Comcast* Dilemma,” May 6, 2010 (“*Third Way*”). For a complete discussion of how Title II regulation of wireless data roaming does not disturb the Commission’s *Third Way* analysis, see *infra*, section V.

⁹ See *infra*, section VI.E.

competition in the small business and enterprise customer segments, in mobile services and in deployment of services in high-cost areas.”¹⁰

Second, the Commission can reduce consumer confusion and complaints. Consumers should not be frustrated and confused when roaming outside of their home markets because they are uncertain whether important data services upon which they depend will be available. The Commission’s mission is to provide a seamless nationwide communications network, and wireless data roaming is a critical component if the Commission hopes to achieve that goal. As Commissioner Copps has rightly 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.”¹¹ Consumers expect their wireless handset, and all of the services that such a handset offers, to be available in any market and at any time. The Commission should not force consumers to wonder why their wireless voice services work when traveling in some areas while they are unable to obtain e-mail, or access the Internet, using their handsets in the same locales. Such losses of connectivity are particularly unacceptable now that non-voice communications are increasingly replacing voice communications for many customers.

And, as the wireless marketplace continues deploying new 4G broadband technologies, such as LTE, wireless data roaming will play an ever-increasing role in the lives of consumers. In order to incent small, rural and mid-tier carriers to invest in next-generation networks, the Commission must assure such carriers that their customers will be able to access these important wireless data services outside areas served by their home carrier. Absent a ubiquitous data roaming environment, small, rural and mid-tier carriers will be disincented to spend the hundreds

¹⁰ *National Broadband Plan* 49.

¹¹ *2007 Roaming Order*, statement of Commissioner Michael J. Copps, approving in part, concurring in part, WT Docket No. 05-265, FCC 07-143 (rel. Aug. 16, 2007).

of millions of dollars necessary to deploy next generation technologies or services. The result will be a less competitive data market in which consumers have fewer competitive choices. Reduced competition will not serve the public interest now that wireless data is becoming an increasingly important part of the typical wireless customer's usage pattern. The Commission's own data shows that wireless access to the Internet continues to increase at a rapid rate.¹² Customers will not be satisfied with data that only works locally. In order to compete effectively, wireless carriers simply must be able to promise their customers nationwide wireless data plans. However, this is impossible to do at present because the largest nationwide providers consistently refuse to enter into automatic wireless data roaming agreements with other carriers at reasonable rates.

The problem is now more acute than ever. The wireless industry has been consolidating at a rapid rate and, as a result, potential wireless data roaming partners have been disappearing. Currently, both AT&T and Verizon Wireless enjoy powerful market positions in their respective air interfaces and frequency bands – an important distinction due to current technological limitations on wireless data roaming compatibility. The scope of the stand-alone networks of AT&T and Verizon Wireless has eliminated their market incentives to enter into reciprocal data roaming agreements with small, rural and mid-tier carriers. The Commission must ensure that small, rural and mid-tier carriers have access to the essential wireless data roaming input in this dysfunctional market. The Commission also must ensure that automatic wireless data roaming is offered by all wireless broadband providers, not just commercial mobile radio service (“CMRS”) providers, and is offered for all existing and future technologies. In short, the time has come for

¹² *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, Fourteenth Report, WT Docket No. 09-66, ¶¶ 181-184 (rel. May 20, 2010) (“*Fourteenth Report*”).

the Commission to state unequivocally that automatic wireless data roaming is a common carrier obligation owed by all providers, to all providers, when technologically feasible. In doing so, it will allow competition to keep pace with technology, to the benefit of all consumers.

Fortunately, the Commission has the ability to require all providers of wireless broadband services to provide wireless data roaming on reasonable terms and conditions under existing Commission precedent, without resorting to novel legal theories, and without overruling any past Commission decisions. When the manner in which wireless data roaming calls are processed is properly understood, the conclusion that automatic wireless data roaming is to be offered as a common carrier service is not new or unique. It builds upon established Commission precedent that a separate telecommunications service that is used to access an information service, but is not part and parcel of the information service, retains its status as “telecommunications” and may properly be regulated as a common carrier telecommunications service.

When analyzing wireless data roaming, it is crucial to separate the specific services and functionalities being provided by each participant in the process. Based upon prior Commission rulings, it is clear that the wireless broadband Internet access service provided to the end-user customer by the home wireless carrier (the “Home Carrier”) is an information service.¹³ However, as set forth in detail in section III within, it should be equally clear that the transmission service provided by a third-party wireless roaming carrier (the “Roaming Partner”) to facilitate data roaming is only telecommunications. A Roaming Partner merely passes the end-user’s transmitted data to the Home Carrier without any material change in the form or content (making the transmission telecommunications). The Home Carrier receives the end-user’s transmitted data and acts upon it to provide the retail information service to which the end-

¹³ See *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007) (“*Wireless Broadband Order*”).

user subscribes. Properly viewed, the transmission provided by the Roaming Partner is functionally equivalent to the telecommunications services provided for voice roaming. In either case, the Roaming Partner is providing telecommunications and not an information service. The Roaming Partner in both instances is merely transporting information generated by the user between or among points of the user's choosing without change in form or content.

Properly recognizing that the transmission provided by the Roaming Partner during a wireless data roaming session is "telecommunications" is the first step of the analysis that compels the Commission to regulate wireless data roaming under Title II.

The second step of the analysis that compels wireless data roaming to be regulated under the Commission's Title II authority is to recognize that the transmission service provided by the Roaming Partner is a common carrier "telecommunication service" as defined by the Act. The Commission and the courts have developed a two part test to determine whether a service should be classified as a common carrier telecommunications service for FCC purposes. That test, elucidated in *NARUC I*,¹⁴ indicates that a service will be regulated as common carriage by the Commission where one of the following two prongs are satisfied: (i) the provider's actions in offering the service indiscriminately to broad classes of users reflect the intention to serve the public as a common carrier; or, (ii) the Commission makes a determination that the public interest requires the service to be offered indiscriminately by the provider to the public.

Nationwide wireless service providers who offer wireless data roaming satisfy both of these tests. For example, the two largest providers of wireless data services offer wide-area

¹⁴ *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), cert. denied., 425 U.S. 992 (1976) ("*NARUC I*").

wireless data roaming services to nearly two hundred million customers combined¹⁵ – a sufficient offering to the general public to meet the first test by any measure. Second, public interest considerations weigh strongly in favor of requiring wireless data roaming to be offered on a common carrier basis. For example, as earlier noted, the *National Broadband Plan* calls for promoting and enhancing broadband deployment throughout the United States by fostering wireless data roaming. Wireless data roaming also will increase competition in the market for wireless services, incent carriers to invest in next-generation networks and provide public safety and national security benefits. For all of these reasons and more, the Commission has ample cause to determine that the public interest will be served only if wireless data roaming is offered on a common carrier basis.

Based on this proper analysis of the wireless data roaming process, MetroPCS agrees with other commenters in this proceeding that wireless data roaming can and should be regulated under the Commission’s Title II authority.¹⁶

III. TECHNICAL DESCRIPTION OF THE WIRELESS DATA ROAMING PROCESS¹⁷

The first step the Commission must take to properly determine the nature and extent of its authority to regulate wireless data roaming is to understand the functions and services performed by each participant in the provision of broadband Internet access service. To that end, a technical description follows of how wireless data roaming works for a code division multiple access (“CDMA”) provider. Although some nomenclature would change, it is MetroPCS’

¹⁵ AT&T offers data roaming to its 87 million customers, while Verizon Wireless offers data roaming to its nearly 93 million customers.

¹⁶ Comments of SouthernLINC Wireless at 32-42, filed Oct. 29, 2007.

¹⁷ For the purposes of these examples, the illustrations assume a 1xRTT or 3G CDMA network. The process substantially is similar with an LTE network configuration, and differing nomenclature under LTE is noted where appropriate.

understanding that the depicted process also is representative of how wireless data roaming works for other air interface technologies. This technical description also largely conforms to the manner in which wireless data roaming will be provided on 4G systems, such as LTE.

A. Home Data Sessions

When a mobile customer initiates a data session in his or her home coverage area using a wireless handset, that data session occurs either entirely within the Home Carrier's network, or is first processed within the Home Carrier's network then is delivered to the World Wide Web, depending upon the type of information service that the customer is requesting. At the outset, certain signaling information is passed between the customer's handset and various network elements, including the base station¹⁸ and the Mobile Switching Center ("MSC"),¹⁹ to establish whether the data session is permitted for that handset based on the customer's data plan and/or current status.²⁰ If the session is permitted, the handset will be anchored on the Home Agent component ("HA") of the packet data switching node ("PDSN").²¹ At that point, the PDSN HA

¹⁸ A base station is a fixed station used for communicating with mobile stations, most commonly mobile wireless handsets. H. Newton, *Newton's Telecom Dictionary* 148 (24th ed. 2008) ("*Newton's*"). In LTE technology, the network element that performs the function similar to the base station is called an e Node B ("eNB").

¹⁹ The MSC is the location of the Digital Access and Cross-connect System ("DACS") in a wireless communications network. *Newton's* 606. The DACS is a simple form of channel switch, and is pre-programmed to switch specific circuits or channels from an incoming port to an outgoing port. *Newton's* 282. In LTE technology, the network element that performs the function similar to the MSC is called the Serving Gateway ("SGW").

²⁰ All of these signaling and set-up functions are assumed in the examples discussed. These signaling and set-up functions include, among other standard functions, registration and Access, Authentication and Authorization ("AAA"). In a roaming scenario, the standard signaling and set-up functions include registration between the roaming networks via the Home Location Registers ("HLR") and AAA functions. These signaling and set-up functions are extremely similar to the manner in which customers are authenticated during a voice roaming session, prior to the Home Carrier authorizing the Roaming Partner to connect the voice call.

²¹ In LTE technology, the network element that performs the similar function to the PDSN is called a Packet Gateway ("PGW").

routes the customer's data traffic to the requested information service, whether that be e-mail, navigation service, or a connection to the World Wide Web.

Figure 1 provides an example of a data session processed entirely within the Home Carrier's network when a customer sends or receives e-mail. When the handset requests an email message for display, that request is transmitted by the Home Carrier's network to the base station, and then on to the MSC. Up to this point, the processing is no different than would be the case for a voice call. However, because the request is a data session, it is passed to the PDSN HA, which directs the request to the Home Carrier (*i.e.*, MetroPCS in the below figures) e-mail server. At the e-mail server, the customer's request results in the retrieval of the customer's stored e-mail data, returning it through the Home Carrier's network to the handset for display. This communications, in which the customer is interacting with and retrieving stored data via telecommunications, is a classic information service.

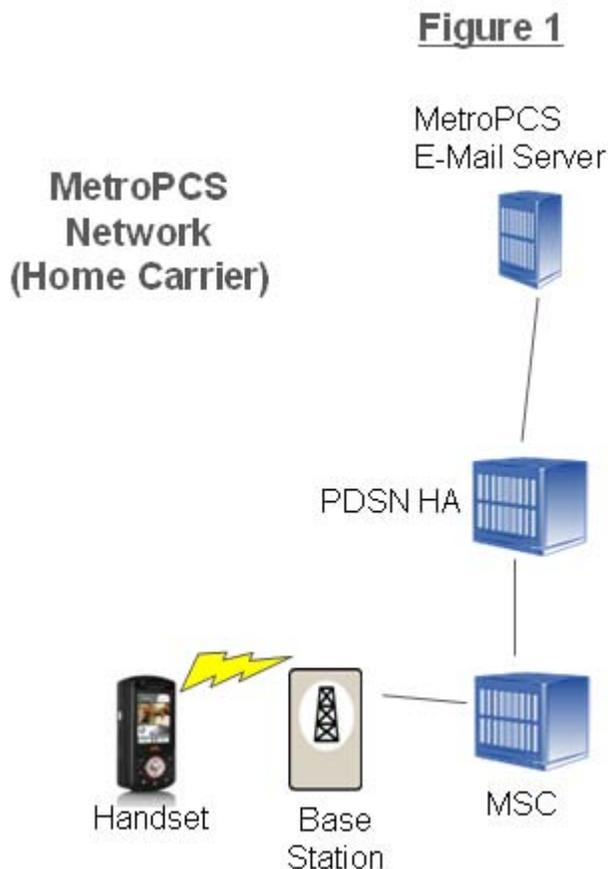
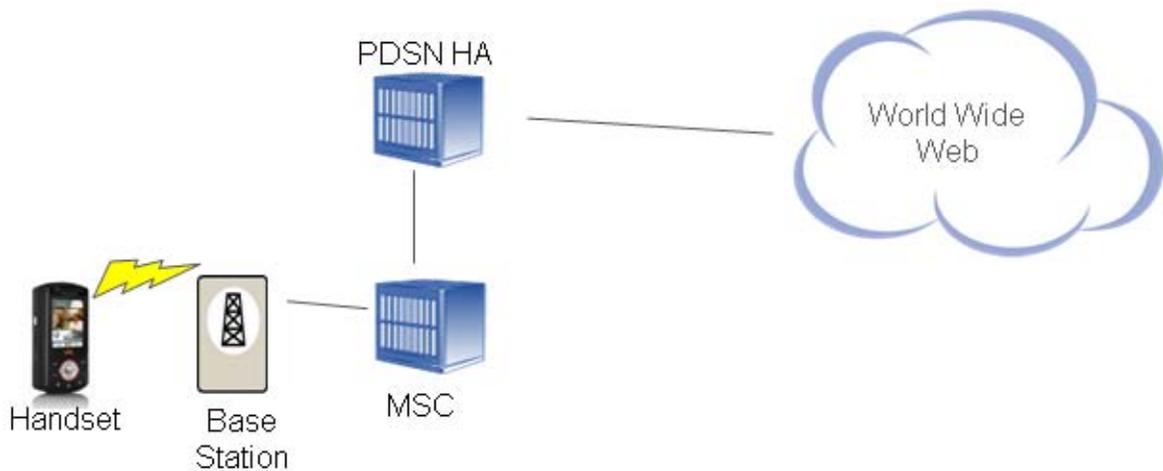


Figure 2 provides an example of a data session where, after the initial processing within the MetroPCS network, the session is handed off to the World Wide Web because the customer is seeking to access a website that is hosted outside of the MetroPCS network. The figure demonstrates that, regardless of whether this request is directed to an element or address within the Home Carrier's network (such as to an email server) or to an element or address outside of the Home Carrier's network (such as to the World Wide Web), the overall process by which that data session is conducted remains largely the same. As shown below in Figure 2, the data session flows through the same Home Carrier network elements, in precisely the same way and along the same functional path, except that the endpoint is a connection to the World Wide Web.

Figure 2

**MetroPCS
Network
(Home Carrier)**



Throughout the entirety of the data sessions depicted in Figures 1 and 2, the Layer 3²² protocol of the session is Internet protocol (“IP”).²³ Depending on the type of handset involved in the data session, the IP protocol may be simple IP (“SIP”), mobile IP (“MIP”), or proxy mobile IP (“P-MIP”). The effective difference between these various protocols relates to the mobility of the data session. A SIP data session uses a static IP address for the handset. When a handset using static SIP for a data session moves from one path, for example within its home coverage area, to another path, *e.g.*, in a Roaming Partner network, the data session will be terminated. Use of MIP or P-MIP allows the data session to be mobile without terminating the session. Regardless of which IP protocol is used by the handset initiating the data session, there is no effect on the data involved in the session. The form and content of the data information being transmitted or received is not changed during this process by the Home Carrier’s network. Accordingly, this transmission meets the definition of “telecommunications.” However, to the extent that the Home Carrier is providing a functionally integrated service that always combines the transmission component with the information service component, the entire service provided to the end user is an information service under the *Wireless Broadband Order*.²⁴

²² Layer 3 is the network layer in the widely-adapted Open Standards Interconnection network model. This layer determines how data is transferred between computers, and also addresses routing within and between individual networks. *Newton’s* 544.

²³ IP protocol is “a standard describing software that keeps track of the Internet’s address for different nodes, routes outgoing messages, and recognizes incoming messages. It allows a packet to traverse multiple networks on the way to its final destination.” *Newton’s* 511.

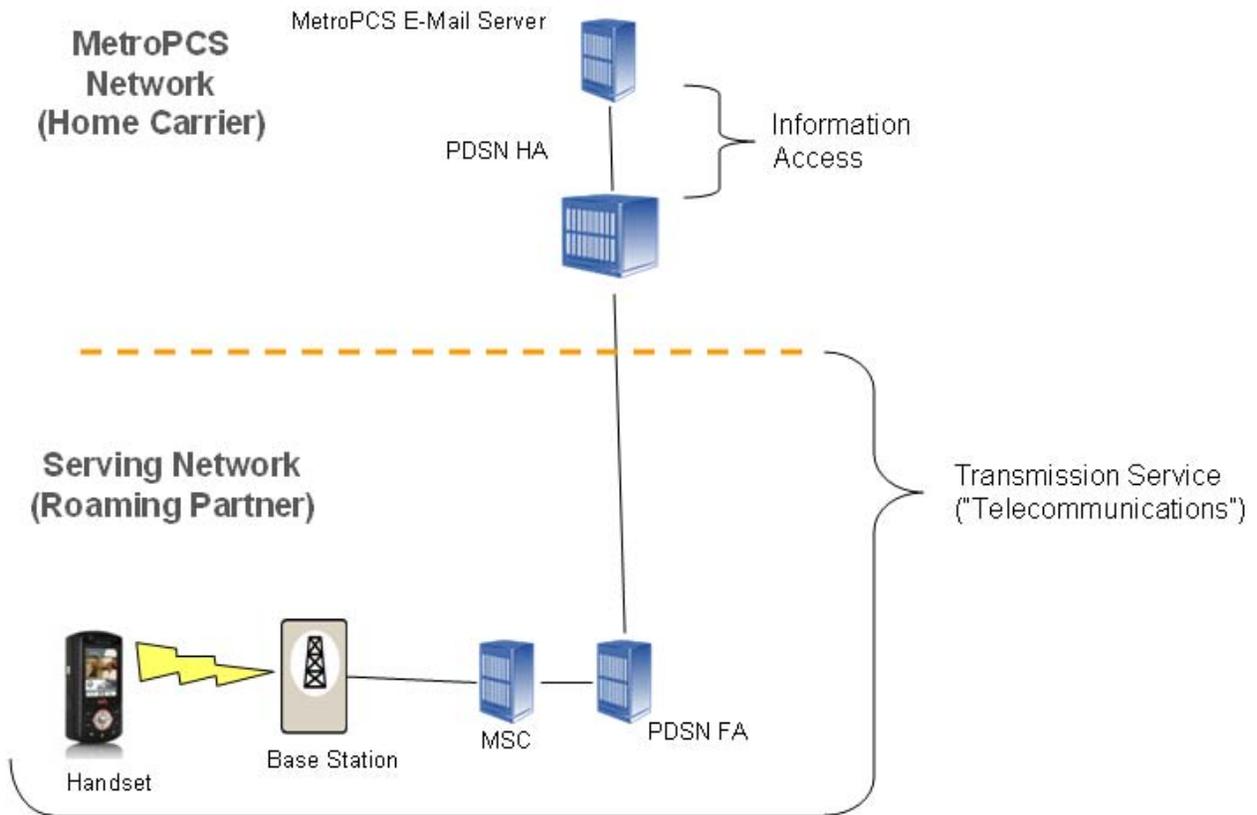
²⁴ See *Wireless Broadband Order*.

B. Roaming Data Sessions

Wireless data roaming adds an additional, non-integrated transmission component to the process because a roaming data session involves two carriers. Specifically, the transmission service component provided by the Roaming Partner allows the Home Carrier to receive its customer's data. Once the data traffic is transmitted to the Home Carrier by the Roaming Partner, the roaming data sessions are the same as home data sessions in terms of how the data traffic involved in the session is moved along the Home Carrier's network, as well as how the requested information service is provided to the customer. As depicted in Figure 3, the roaming handset will, similar to the process during a home data session scenario, first undertake signaling to authenticate and validate the customer's eligibility to engage in a data session. Once the handset has accomplished the necessary set-up signaling, the handset will send its traffic through the base station to the MSC and on to the PDSN Foreign Agent ("PDSN FA"). The PDSN FA will then transmit the customer's data traffic – unchanged – back to the Home Carrier's PDSN HA.²⁵ This transmission from the handset to the PDSN HA is a pure transmission service that is virtually indistinguishable from the manner in which roaming transmissions occur during a voice roaming session. Once again, the Layer 3 protocol used by the roaming data session is IP throughout, the same as described above during a home data session.

²⁵ This transmission may occur via dedicated facilities or may be via the public IP network. This is merely telecommunications and the content is not changed from the Roaming Partner's network to the Home Carrier's network.

Figure 3



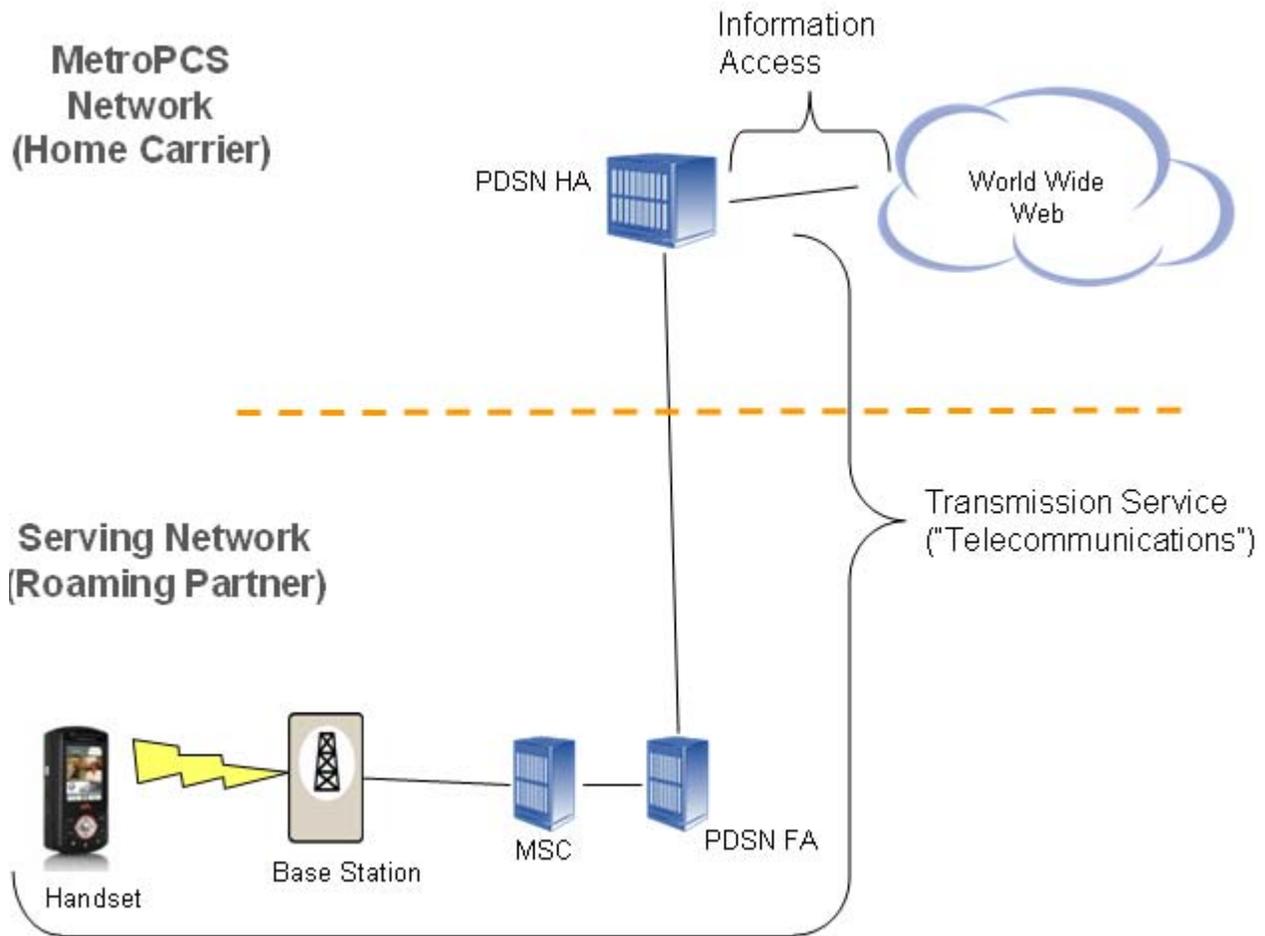
This transmission of the customer’s data traffic from the customer handset to the Home Carrier’s PDSN HA in no way involves the “generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available [of] information,”²⁶ which would convert the transmission into an information service. Once the Roaming Partner’s transmission reaches the Home Carrier’s PDSN HA, the data session traffic follows an identical path and process as it does during a home data session, with the Home Carrier’s PDSN HA acting on the data and routing it to the requested information service.

²⁶ 47 U.S.C. § 153(20).

Specifically, the information access component of a data session, whether a home data session or a roaming data session, occurs on the Home Carrier's network. Put simply, it is the Home Carrier, and not the Roaming Partner, that provides the information service to the customer – regardless of whether the customer is engaged in a home data session or a roaming data session. As depicted in Figure 3, when a roaming customer's handset requests an e-mail, the path the data takes from the Home Carrier's PDSN HA to the e-mail server (*i.e.*, the information access portion of the data session) remains the same as in a home data session scenario. In each instance, the customer accesses the e-mail service via the Home Carrier's PDSN HA. The service provided the Roaming Partner to the handset to transmit the data session to the Home Carrier's PDSN HA is a pure transmission service, in which there is no change to the form or content of the roaming customer's data.

Likewise, when a data session moves outside the Home Carrier's network (such as to the World Wide Web), the pathway is the same, and the fact that the Roaming Partner is providing a severable transmission component does nothing to change this fact. As Figure 4 shows, even when a roaming customer requests information from the World Wide Web, the information access component of the data session is still provided via the Home Carrier's PDSN HA.

Figure 4



The network transport provided by the Roaming Partner does not change the form or content of the information provided or requested by the user in a data session. Any processing functions that constitute information services are done by the Home Carrier. Accordingly, since the Roaming Partner affects no change in the form or content of the information sent or received by the end-user, the transmission provided by the Roaming Partner is telecommunications.

Thus, regardless of the nature of the service (*e.g.*, e-mail or access to the World Wide Web), the components that constitute an information service are provided in all instances by or through the Home Carrier, not the Roaming Partner. When a customer roams on a Roaming Partner network and requests a data session through the Home Carrier, the e-mail or other information he receives or transmits is processed through the Home Carrier's e-mail or

information server – not the Roaming Partner’s e-mail or information server. Indeed, the information services available to the Roaming Partner’s own customers are not available to the Home Carrier’s customers and *vice versa*.²⁷

Based on the foregoing, it is clear that the service provided to the Home Carrier by the Roaming Partner is merely a transmission service that, as discussed in detail below, qualifies under existing legal precedents as telecommunication services under the Act, and thus is subject to the Commission’s Title II authority.

IV. THE COMMISSION HAS AMPLE LEGAL AUTHORITY TO EXTEND AUTOMATIC ROAMING OBLIGATIONS TO WIRELESS DATA SERVICES UNDER TITLE II OF THE ACT

The Commission has the legal authority to extend automatic roaming obligations to wireless data roaming even though such roaming may not result in interconnection to the public switched telephone network (“PSTN”) and would not be considered CMRS. Importantly, the authority to regulate wireless data roaming derives from existing precedent under Title II that remains good law: the Commission need not and should not alter the legal footing or provide a new legal framework to sustain its jurisdiction. Because of the critical importance of wireless data roaming to the implementation of the *National Broadband Plan*, the Commission should not rely on a novel legal theory that reverses years of Commission precedent (*e.g.*, the “*Third Way*” reclassification and forbearance approach²⁸), and is certain to generate protracted legal

²⁷ Of course, the information service provider for the Home Carrier and the Roaming Partner could be the same, or the customer could have a direct customer relationship with the Roaming Partner. However, the important point is that the information service included with the Home Carrier wireless broadband Internet access service or Home Carrier information service is the one provided by the Home Carrier and not the Roaming Partner, and any information service is provided through the PDSN HA, not the PDSN FA. For example, a MetroPCS e-mail customer’s e-mail address is customer@mymetromail.com; when roaming on Leap Wireless a MetroPCS customer does not have a change of address to customer@leapwireless.com.

²⁸ See generally *Third Way*.

challenges and uncertainty. Instead, the Commission should choose a simple, direct, unremarkable approach that is certain to stand up to judicial scrutiny, and comports with existing law and precedent.

Wireless broadband Internet access service provided to the end-user customer by the Home Carrier is, and under the MetroPCS jurisdictional approach remains, an “information service” under the Communications Act definition and the *Wireless Broadband Order*.²⁹ However, the separate, severable, non-integrated transmission service provided by a third-party wireless Roaming Partner is properly viewed as purely a transmission service that qualifies under long-standing Commission precedent as “telecommunications” and as a “telecommunications service.”³⁰ Additionally, the transmission service provided by the Roaming Partner satisfies the Commission’s two-prong test for common carrier treatment, as set forth in the *NARUC I* decision.³¹ Accordingly, wireless data roaming must be classified as a common carrier “telecommunications service” regulated under Title II of the Act.

Under this approach, the Commission has jurisdiction over wireless data roaming regardless of whether the wireless end-user or the Home Carrier is viewed as the one requesting wireless data roaming from the Roaming Partner. Certainly, if the Home Carrier is viewed as the

²⁹ *Wireless Broadband Order* ¶ 1 (finding that “wireless broadband Internet access service is an information service under the Communications Act of 1934, as amended”).

³⁰ This critical distinction – based upon the proper separation of the respective services performed by the Home Carrier and the Roaming Partner – often gets lost during discussions of wireless data roaming. When the two separate information and telecommunications services components become conflated the result is a flawed jurisdictional analysis. There have been instances in the past where the Commission has classified an integrated service offered by a single carrier, which contains both telecommunications service and information service components in a single non-severable offering, as an information service for regulatory purposes. But, those cases have no bearing here. Two independent carriers are involved in delivering a wireless data roaming service, and the functionalities offered by each are distinct and severable.

³¹ *NARUC I*, 525 F.2d 630; see also *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 40 (1998) (“*Stevens Report*”).

wireless data roaming “customer” – which is the better view in the opinion of MetroPCS – it seems self-evident that what is being provided is a simple wholesale transmission/telecommunications service. This wholesale transmission input is used by the Home Carrier to provide a separate retail information service to its end-user customers. However, even if the wireless end-user is viewed as the Roaming Partner’s customer, the customer only receives from the Roaming Partner a transmission service that qualifies as a severable telecommunications service, since any functionalities that convert this to an information service ultimately are provided by the Home Carrier. Notably, the wireless data roaming that is obtained from the Roaming Partner is not functionally integrated by the Roaming Partner with the information service that the end-user is purchasing from the Home Carrier.³² Thus, the Title II jurisdictional analysis applies even if the Commission finds that the Home Carrier or the wireless end-user is requesting the wireless data roaming services – making irrelevant the question, “who is the customer of the Roaming Partner?”³³

A finding by the Commission that wireless data roaming is a Title II common carrier service also would be consistent with prior Commission and Supreme Court precedent. Specifically, as is discussed in greater detail below, this analysis is consistent with the Supreme Court’s ruling in *Brand X*, the Commission’s *Wireless Broadband Order*, and other relevant precedent. And, under this analytical framework, the Commission’s authority to regulate wireless data roaming is not and should not be dependant upon the classification of wireless data

³² The non-integrated nature of the roaming component is conclusively demonstrated by the fact that the end user can access the information service in his or her home market with or without roaming component.

³³ In the opinion of MetroPCS, the better view is that the Home Carrier is the roaming customer of the Roaming Partner. Generally, the Home Carrier has a contract with the Roaming Partner. In contrast, there is no direct contractual relationship between the end-user customer and the Roaming Partner that would suggest that the end-user is, in fact, a “customer” of the Roaming Partner.

roaming as CMRS but, rather, extend to all facility-based wireless data service providers whether or not they also provide CMRS.

A. Wireless Data Roaming is Telecommunications

The Commission must recognize a fundamental and oft-overlooked truth: based on the manner in which wireless data roaming is provided, it is a simple transmission service that qualifies as “telecommunications.” The Act defines “telecommunications” as:

the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.³⁴

This definition encompasses the transmission service which occurs during a wireless data roaming session as described in the prior technical discussion.³⁵ The data is transmitted – without change in the form or content of the information sent – from the handset to the Home Carrier by the Roaming Partner. Once the data reaches the Home Carrier, the data is acted upon and the resulting information service is provided. Accordingly, any portion of the service that would constitute an information service is provided by the Home Carrier, not the Roaming Partner. Thus, the transmission provided in connection with wireless data roaming is information generated by the roaming customer to points dictated by the roaming customer without change in form or content, making it “telecommunications” under § 153(43) of the Act.

As discussed in the technical section,³⁶ when a wireless end-user is travelling outside of his or her home market and seeks to receive or access wireless data services using the network of a third party wireless Roaming Partner, neither the customer nor the Home Carrier is buying an information service from the Roaming Partner. Rather, to the extent that the customer is

³⁴ 47 U.S.C. § 153(43).

³⁵ *See supra*, section III.B.

³⁶ *See supra*, section III.

purchasing information services from the Home Carrier, the Home Carrier is receiving a pure transmission service from the Roaming Partner. Under this setup, the Roaming Partner transmits the customer's data to and from the Home Carrier's network; the data is only acted upon, or the content is only provided by, the Home Carrier. The point at which the customer's data is acted upon by the Home Carrier is when the provided service becomes an information service. This important distinction removes much of the controversy from the wireless data roaming discussion – the sending of unaltered data from the handset to the Home Carrier by the Roaming Partner is telecommunications.³⁷

The analytical framework that MetroPCS advocates has numerous analogs among other services. For example, when viewed from the end-user's perspective, the wireless data roaming experience is similar to that of many wired Internet customers who subscribe to an integrated Internet access service from home, where the ISP provides both connectivity from the home to the ISP, and from the ISP to the Internet. When that wired Internet customer is travelling away from home, he or she may use a third-party's dial-up circuit to access the Internet account in order to check email, change flight reservations or surf the web. The dial-up service being used to access the ISP when the user is away from home is a separate, non-integrated Title II telecommunications service, notwithstanding the fact that it is used to access the Internet. This transmission component is comparable to the transmission that occurs when a wireless customer uses data services when roaming. The Roaming Partner acts as the "dial-up" connection

³⁷ MetroPCS accepts that the Home Carrier's service to its own customer is an information service – a holding made in the *Wireless Broadband Order* that would remain undisturbed. However, the fact that the Home Carrier's service to its customer is an information service does not dictate or change the service provided by the Roaming Carrier, nor does it prevent such service from being telecommunications.

between the end-user and the Home Carrier; it is the Home Carrier – just like it is the ISP in the dial-up example – that provides the end-user with the information service.³⁸

Viewed from the Home Carrier’s perspective, wireless data roaming is analogous to an ISP purchasing a T1 line from a third party carrier for use in providing connectivity to its information service. While the data required to provide the information service is transmitted over the T1, this does not alter the fact that the carrier providing the T1 is providing a separate, non-integrated transmission (and therefore telecommunications) service that is not part and parcel of the information service.

The FCC defines an information service as:

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.³⁹

The transmission services being offered by the Roaming Partner do not meet this definition. To the extent that information is being transformed or processed, these functions are being performed or directed by the Home Carrier, not by the Roaming Partner. In sum, it is clear that wireless data roaming falls under the definition of “telecommunications” in the Act.

B. Wireless Data Roaming is a Telecommunications Service

In order to qualify for common carrier treatment, wireless data roaming service also must qualify as a “telecommunications service.” The Communications Act defines a “telecommunications service” as:

³⁸ The fact that the customer, and not the ISP, is purchasing such service does not alter the analysis. Each provider’s service must be viewed separately and without reference to what the other provider provides.

³⁹ 47 U.S.C. § 153(20).

the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of facilities used.⁴⁰

This definition is satisfied by providers of wireless data roaming, because: (i) the provided transmission service is telecommunications, as discussed above; (ii) data roaming is provided for a fee; and (iii) the Roaming Partner satisfies the *NARUC I* tests, indicating that their wireless data roaming services are, or should be, accorded common carrier treatment.⁴¹ The result of this analysis is that a Roaming Partner provides a “telecommunications service” under Title II of the Communications Act.

In *NARUC I*, the D.C. Circuit endorsed a two-pronged approach for determining whether a service would be treated as a common carrier service. First, the court held, “we must inquire ... whether there will be any legal compulsion ... to serve [the public] indifferently, and, if not, second whether there are any reasons, implicit in the nature of ... the operations to expect an indifferent holding out to the eligible user public.”⁴² Put simply, the court held that a service would become a common carrier service under the *NARUC I* test where: (i) the provider’s actions (*i.e.*, the indiscriminate offering of service to a broad class of users) reflects the desire or intention to serve the public indiscriminately as a common carrier, or (ii) the Commission makes a determination that the public interest requires the service to be offered indiscriminately to the public by the provider. If a service satisfies either prong of the two-part *NARUC I* test, the service is properly regulated as a common carrier service. Here, wireless data Roaming Partners – particularly the largest wireless carriers – satisfy both prongs of the *NARUC I* test.

⁴⁰ 47 U.S.C. § 153(46).

⁴¹ These prongs effectively detail what is required to be held out or offered to “directly to the public.” See *NARUC I*, 525 F.2d 630; see also 47 U.S.C. § 153(46).

⁴² *NARUC I*, 525 F.2d at 642.

1. Roaming Partners Offer Roaming Services to the Public Indiscriminately

In examining provider conduct under the first prong of the *NARUC I* test, the Commission considers whether a carrier is making “individualized decisions, whether and on what terms to serve” rather than holding itself out to such classes of users as to be deemed offering service generally to the public.⁴³ Applying this first test, it is clear that wireless data Roaming Partners satisfy this requirement in several ways. In the first instance, a carrier who offers wireless data roaming services to its own customers when they roam out of the local market where they are based is serving a sufficient class of customers to effectively be deemed to be serving the public.⁴⁴ By way of example, AT&T offers wireless data roaming services to its 87 million subscribers.⁴⁵ Those 87 million AT&T customers represent nearly 30 percent of the total United States population. Verizon Wireless, for its part, offers wireless data roaming service to 92.8 million subscribers – representing greater than 30 percent of the United States population.⁴⁶ Offering wireless data roaming services to such an enormous portion of the American populace certainly constitutes offering wireless data roaming to “such [a] class[] of users as to be effectively available directly to the public.”⁴⁷

⁴³ *Id.*

⁴⁴ See 47 U.S.C. § 153(46) (providing the definition of a “telecommunications service”).

⁴⁵ AT&T reported a total of 87.0 million subscribers in its latest quarterly report. “Wireless Broadband Growth, Further Advances in IP-Based Services, Strong Margins and Cash Flow Highlight AT&T’s First-Quarter Results,” Press Release (Apr. 21, 2010), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=30761&mapcode=financial>.

⁴⁶ “Verizon Reports Continued Growth in Cash Flow in 1Q; Solid FiOS, Wireless Growth in Customers and Revenues,” Press Release (Apr. 22, 2010), available at <http://investor.verizon.com/news/view.aspx?NewsID=1049>.

⁴⁷ 47 U.S.C. § 153(46).

This first prong of the *NARUC I* test may also be met where Roaming Partners offer their wireless data roaming services to a wide variety of third party carriers. Verizon Wireless' recent rural LTE roaming initiative constitutes just such a circumstance.⁴⁸ Verizon is holding itself out as offering wireless data roaming services to other carriers, and appears to be claiming to do so on an indiscriminate basis. In addition, Verizon Wireless and AT&T offer wireless data roaming services to a number of other carriers, including MVNOs which are actively competing in the wireless space.⁴⁹ In sum, looking closely at the manner in which Roaming Partners provide wireless data roaming to their own customers,⁵⁰ and to other carriers, it becomes clear that such wireless data roaming services are being offered indiscriminately to the public, and thus satisfy the first prong of the *NARUC I* test for common carrier treatment.

2. The Public Interest Demands that Wireless Data Roaming Be Classified as a Common Carrier Service

Although satisfaction of the first prong of the *NARUC I* test is sufficient to bring automatic wireless data roaming within the confines of common carriage, the Commission also should find that the second prong of the *NARUC I* test is satisfied because public interest considerations strongly support a finding that there are “reasons, implicit in the nature of ... the

⁴⁸ Verizon Wireless recently announced plans to provide complementing LTE data roaming agreements to rural carriers offering service in areas that Verizon Wireless itself does not cover. See “LTE in Rural America,” <http://aboutus.vzw.com/rural/Overview.html>.

⁴⁹ The retail rates offered by these MVNOs to their customers (which presumably include a measure of profit for both the MVNO and carrier offering the wholesale data services) are substantially lower than the rates offered by either AT&T or Verizon Wireless to small, rural and mid-tier carriers requesting wireless data roaming services – a pricing discrepancy that may indicate anticompetitive behavior.

⁵⁰ An important point is that although Verizon Wireless and AT&T portray themselves as a single company, each market is separately licensed on a market-by-market basis and in many instances they may not hold the entire interest in a particular licenses in a particular market.

operations to expect an indifferent holding out to the eligible user public.”⁵¹ The ability to offer nationwide data service has become an integral part of a competitive wireless offering in today’s marketplace. Consumers are becoming ever-more dependent on the use of wireless data, which continues to grow at an astonishing pace.⁵² In short, wireless data service has become as integral a piece of a competitive wireless plan as SMS was in 2007 when the Commission saw fit to include it as an ancillary portion of the automatic voice roaming requirement.⁵³ Automatic wireless data roaming also serves other Commission objectives. The *National Broadband Plan* calls for the increased availability of wireless broadband, and recognizes the integrally important role that wireless data roaming plays in the implementation of the *National Broadband Plan*’s noble aspirations.⁵⁴

The public interest also will be served by mandating automatic wireless data roaming because the market for wireless data roaming is broken, and market forces are not working to foster the ubiquitous availability of wireless data roaming. Technology-limited by its nature,⁵⁵ the wireless data roaming market is dominated by AT&T on the GSM side and Verizon Wireless on the CDMA side, with each enjoying a dominant market position. Both of these carriers are reported to be refusing wireless data roaming or proposing to offer it at prohibitive rates – *e.g.*, at rates where a typical smartphone user could incur hundreds if not thousands of dollars in roaming fees for typical usage. Further, since the largest carriers have consolidated the industry

⁵¹ *NARUC I*, 525 F.2d at 642. The public interest considerations weighing strongly in favor of automatic data roaming are discussed in greater detail *infra*, section VI.

⁵² *Fourteenth Report ¶¶* 181-184.

⁵³ *See 2007 Roaming Order*.

⁵⁴ *National Broadband Plan* 35, 49.

⁵⁵ As discussed in greater detail below, the data roaming marketplace is divided along technological lines, with carriers either providing GSM or CDMA roaming services. *See infra*, section VI.B.

significantly through acquisitions, many roaming alternatives have vanished, which enables the large merged successors to flex their anticompetitive muscles. In fact, one small rural carrier indicated in connection with the Verizon-Alltel merger that Verizon Wireless did not want wireless data roaming revenues from that carrier – but rather wanted the carrier’s customers – which would inevitably move to Verizon Wireless if wireless data roaming was not available. Commission intervention is required to correct this market failure and to restore a competitive balance to the market for critical wireless data roaming inputs. This market failure only promises to grow as small, rural and mid-tier carriers are forced to decide whether or not to invest in next-generation broadband technologies, such as LTE. Accordingly, the Commission should find that a common carrier automatic wireless data roaming requirement is in the public interest, thus bringing wireless data roaming services under Title II.

3. Given the Mutually-Exclusive Categories of Telecommunications Services and Information Services, the Commission Must Find that Wireless Data Roaming is a Telecommunications Service

The Commission consistently has noted that the categories of “telecommunications service” and “information service” are mutually exclusive.⁵⁶ As shown in the foregoing analysis, the actual service provided by the Roaming Partner during a wireless data roaming session is a pure transmission service, provided to the public, and therefore is a telecommunications service. Given this finding, it is axiomatic that wireless data roaming cannot also be an information service, and the Commission should accordingly find that automatic wireless data roaming should be regulated under Title II as a common carrier service.

⁵⁶ See, e.g., *Wireless Broadband Order* ¶ 105.

C. A Title II Approach to Implementing Automatic Wireless Data Roaming is Consistent With Existing Commission and Supreme Court Precedent

When adopting new rules and regulations that meet important policy objectives, which is the case with the proposed automatic wireless data roaming requirement, the Commission should, if possible, avoid using new or untested legal approaches that may be overturned on judicial appeal. By adopting the well-supported Title II approach to regulating wireless data roaming, the Commission will be on firm legal grounds which are fully consistent with relevant Commission and U.S. Supreme Court precedent. A finding that the Roaming Partner is providing a transmission/telecommunications service allows the Commission's legal analysis for wireless data roaming to fit squarely within the confines of the Supreme Court's *Brand X* decision and the Commission's own *Wireless Broadband Order*.

In *Brand X*, the U.S. Supreme Court upheld as reasonable the classification of cable modem service as an information service, as opposed to a telecommunications service. The Court reached this conclusion because it found that the telecommunications portion and the information service portion of cable modem service were part of one "integrated finished product."⁵⁷ This analysis supports the view that the service offered by the Home Carrier is an information service. Conversely, as discussed above, the wireless data roaming provided by the Roaming Partner is separate and distinct from the service provided by the Home Carrier. Due to this distinguishing factor, Commission regulation of wireless data roaming under Title II is fully consistent with the Supreme Court's majority opinion in *Brand X*.

The pure transmission service acquired by the Home Carrier from the Roaming Partner certainly is not an information service. Under the majority decision in *Brand X*, a service or

⁵⁷ *National Cable & Telecommunications Association, et al. v. Brand X Internet Services, et al.*, 545 U.S. 967, 990 (2005) ("*Brand X*").

product is defined by “what the consumer perceives to be the integrated finished product.”⁵⁸

From the viewpoint of the Home Carrier, the finished product being acquired from the Roaming Partner by the Home Carrier is a simple transmission (and therefore telecommunications) service. Put another way, automatic wireless data roaming is a wholesale service provided by the Roaming Partner to the Home Carrier, who then uses the wholesale service to provide a separate retail information service to its own subscribers. The mere fact that the retail product provided to end-user customers is itself an information service should have no bearing on the classification of the wholesale transmission input. As described in an earlier example, the fact that an ISP provides a retail information service to its end-user customers does not change the finding that the T1 line it purchases to provide these services is telecommunications.

Commission precedent establishes that the regulatory classification of a retail service can properly be deemed irrelevant to the classification of the wholesale input as a telecommunications service.⁵⁹

Even if the Commission were for some reason to determine that the end-user was the customer of the Roaming Partner, a Title II analysis remains fully consistent with *Brand X*. Specifically, if the wireless end user is viewed as the customer of the Roaming Partner, the telecommunications service classification arises from the fact that the wireless data roaming provided by the Roaming Partner is not functionally integrated with the information service acquired from the Home Carrier. Because the wireless end-user can enjoy wireless Internet access service from the Home Carrier when not roaming, the roaming component is not, in the

⁵⁸ *Id.* at 990.

⁵⁹ See, e.g., *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, 22 FCC Rcd. 3513, ¶ 14 (2007).

words of the majority opinion in *Brand X*, a “single, integrated offering” but rather is “separable from the data-processing capabilities of the service.”⁶⁰ Customers traveling within their home market, or traveling within other markets served by the Home Carrier, are provided with wireless Internet access that is entirely independent from any roaming function. Thus, it is shown that the retail information service is functionally distinct from the transmission service provided by the Roaming Partner during a wireless data roaming session.

Continuing the analysis, in *Brand X* the Supreme Court held that, once it is clear that two services are functionally distinct from one another, a critical question arises: whether the input component, *i.e.*, the wireless data roaming transmission service provided by the Roaming Partner, is “sufficiently integrated with the finished service [*i.e.*, the information service provided by the Home Carrier)] to make it reasonable to describe the two as a single, integrated offering.”⁶¹ With respect to wireless data roaming, the answer clearly is “no.” Much like the majority in *Brand X* stated that a hungry customer “can pick up a pizza rather than having it delivered,”⁶² so, too, may a consumer of wireless data services obtain such services with or without delivery (in this case, the roaming service). The conclusion that the transmission component and the information service component are properly viewed as severable is further supported by the fact that wireless end-users are typically required to pay specific roaming fees, or to pay an increased price for a wireless data plan that includes wireless data roaming. The fact that consumers usually pay an additional fee for an additional service (the ability to use wireless data services while roaming) weighs heavily in favor of a finding that the wireless data roaming component is a separate offering from the information service provided by the Home Carrier.

⁶⁰ See *Brand X*, 545 U.S. at 997; see also *Stevens Report* ¶¶ 57-60.

⁶¹ *Brand X*, 545 U.S. at 988.

⁶² *Id.* at 990.

Consistent with the majority’s analysis in *Brand X*, the transmission services and the information services provided in connection with wireless data roaming are distinct components purchased from different parties that are not integrated. Accordingly, the transmission component (provided by the Roaming Partner) of wireless data roaming should be considered separate and apart from the retail information service (provided by the Home Carrier), and must be viewed as distinct under the *Brand X* integration standard.

This analysis also is entirely consistent with the Commission’s *Wireless Broadband Order*. The *Wireless Broadband Order* dealt only with the information service provided by the Home Carrier – a separate and distinct portion from the transmission/telecommunications component provided by a Roaming Partner. The main conclusion reached in the *Wireless Broadband Order* was that the Commission “classif[ied] wireless broadband Internet access service as an information service.”⁶³ This conclusion, however, was focused on the integrated service offered by the Home Carrier to the customer. Here, since the service offered by the Roaming Partner does not include any information service capabilities, it would not be covered by the *Wireless Broadband Order*. Regulating automatic wireless data roaming under Title II allows the Commission to remain consistent with this ruling.

Regulating wireless data roaming under the Commission’s Title II authority does not require the Commission to reclassify wireless broadband, and instead allows it to reach the simple and unremarkable conclusion that the transmission service provided by a Roaming Partner is a telecommunications service. The *Stevens Report*, which was the Commission’s first foray into the issues presented here, also correctly made findings that are consistent with the later *Wireless Broadband Order*. In the *Stevens Report*, the Commission found that “the provision of

⁶³ *Wireless Broadband Order* ¶ 18.

transmission capacity to Internet access providers and Internet backbone providers is appropriately viewed as a ‘telecommunications service’ or ‘telecommunications’ rather than ‘information service.’”⁶⁴ The Commission found in the *Wireless Broadband Order* that the telecommunications transmission component of an integrated wireless broadband Internet access service offered to end users using the provider’s own transmission facilities constituted an information service because the transmission component was “part and parcel of the Internet access service’s information service capabilities.”⁶⁵ Wireless data roaming provided by Roaming Partners are not “part and parcel” of the Home Carrier’s Internet access service offering. The Commission found that “if a wireless broadband Internet access provider chooses to offer the telecommunications transmission component as a telecommunications service, then it is a common carrier subject to Title II.”⁶⁶ This is precisely what occurs with wireless data roaming – the Roaming Partner is offering the transmission component separately from the end-user’s access to the Internet or other information services.

Thus, the Title II approach to automatic wireless data roaming is consistent with, and can be applied using, existing Commission precedent, would not require overruling prior Commission decisions, such as the *Wireless Broadband Order*, and would not require challenge or reinterpretation of the binding Supreme Court precedent set forth in *Brand X*.

⁶⁴ *Stevens Report* ¶ 15.

⁶⁵ *Wireless Broadband Order* ¶ 31.

⁶⁶ *Id.* ¶ 33.

D. Wireless Data Roaming is a Telecommunications Service and Not a Mere Billing and Collection Service

The Commission previously recognized that roaming services are not mere billing and collection services, and the Title II legal analysis supports that finding.⁶⁷ Wireless roaming services are legally distinct from LEC billing and collection services, which are not common carriage because they do “not allow customers of the service ... to communicate or transmit intelligence of their own design and choosing,”⁶⁸ and because they can be offered by non-communications entities such as credit card companies. Roaming, on the other hand, was properly found to give “access to a foreign network in order to communicate messages of their own choosing,”⁶⁹ rather than providing merely a billing and collection function. While the Commission made this determination with respect to voice roaming, the identical analogy applies to wireless data roaming, and the Commission should be undeterred by any arguments to the contrary.

E. Wireless Data Roaming is Not a CMRS Service and Can Be Regulated Under Title II Without Regard to CMRS Status

One benefit to using Title II as the basis for regulating wireless data roaming is that it does not depend on wireless data services being classified as “commercial mobile service” under the Act,⁷⁰ or as “commercial mobile radio service” or CMRS service under the FCC rules. Under the Act and the FCC’s rules, a CMRS classification relates to “interconnected service”

⁶⁷ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 11 FCC Rcd 9462, ¶ 10 (1996).

⁶⁸ *Id.* (citing *Detariffing of Billing and Collection Services*, Report and Order, 102 F.C.C.2d 1150, on recon., 1 FCC Rcd 445 (1986)).

⁶⁹ *Id.*

⁷⁰ 47 U.S.C. § 332(d)(1).

with the PSTN.⁷¹ Wireless data roaming, when used to provide wireless broadband Internet access, is not CMRS since it is not interconnected with the PSTN. This is consistent with the *Wireless Broadband Order* that found that wireless Internet broadband services were not CMRS precisely because they are not interconnected services.⁷² Notably, the foregoing Title II analysis does not require wireless data roaming to be CMRS in order to be regulated under Title II as a common carrier service. The Commission's authority to mandate automatic wireless data roaming under Title II is based upon the status of the transmission as telecommunications, and the status of the service as telecommunications service, and not dependent on CMRS status at all. Importantly, this Title II analysis does not require the Commission to alter the course set in its *Wireless Broadband Order*, which found wireless broadband Internet access to be an information service and not CMRS.⁷³

Relying on its Title II authority to regulate wireless data roaming also enables the Commission to extend the automatic wireless data roaming mandate to all wireless carriers, and not just to CMRS carriers. The wireless data market includes significant broadband competitors, such as Clearwire, who offer only wireless broadband data services, but not CMRS. Given the expansive networks constructed by such providers, it would be unwise for the Commission not to include these providers among those required to provide automatic wireless data roaming at just and reasonable rates and on reasonable terms and conditions. As wireless broadband technology improves and begins to compete head-to-head with at-home wired broadband, the Commission is

⁷¹ 47 U.S.C. § 332(d)(2).

⁷² *Wireless Broadband Order* ¶¶ 41-47.

⁷³ *See id.* This is only true if an information service is being provided without being connected to the public switched telephone network ("PSTN"). For example, to the extent a broadband Internet connection is used to provide VoIP calls terminated on the PSTN, such calls may be CMRS since they would be interconnected with the PSTN.

sure to see a growth in the number of wireless broadband-only providers. By choosing to exercise its Title II authority to regulate wireless data roaming, the Commission can ensure that these data-only providers are covered by its decisions pertaining to wireless data roaming regulations, while at the same time not upsetting Commission or judicial precedent.

V. TREATING WIRELESS DATA ROAMING AS A TELECOMMUNICATIONS SERVICE TO BE REGULATED AS COMMON CARRIAGE UNDER TITLE II IS DISTINCT FROM THE *THIRD WAY* APPROACH REGARDING NET NEUTRALITY ADVOCATED BY THE COMMISSION

As discussed above, regulating wireless data roaming under Title II has the benefit of being legally and factually correct, and fully consistent with prior Commission decisions. By regulating the wireless data roaming provided by the Roaming Partner as a non-integrated telecommunications service, the Commission can assure its authority to regulate wireless data roaming without wandering into the minefield that surrounds the current debate concerning the Commission's authority to promulgate net neutrality regulations in the wake of the *Comcast* decision. Notably, the *Third Way* memo authored by Commission General Counsel Austin Schlick specifically contemplates changing the fundamental way the Commission views retail Internet access services. No such fundamental change is required when regulating wireless data roaming under Title II.

After the Court's decision in *Comcast*, Chairman Genachowski suggested that the Commission may have authority over broadband Internet services using a *Third Way* approach which would focus on the dissent in the *Brand X* case.⁷⁴ In the dissent in *Brand X*, Justice Scalia, joined by Justices Souter and Ginsburg, concluded that the "computing functionality" and the broadband transmission component of retail Internet access service must be acknowledged as

⁷⁴ *Third Way* 3.

“two separate things.”⁷⁵ Using this separation theory, Chairman Genachowski and General Counsel Schlick then suggested that the non-severable broadband transmission component could be regulated under Title II.⁷⁶ The *Third Way* Title II approach would be coupled with certain forbearance to avoid over-regulation.

In the case of data roaming, a finding that the transmission component offered by the Roaming Partner is telecommunications and should be offered as a common carrier telecommunications service would not be inconsistent with the “two separate things” approach. The transmission component offered by the Roaming Partner is telecommunications precisely because the “computing functionality” is not provided by the Roaming Partner. However, whether or not the Commission decides to separate retail wireless broadband Internet services into distinct transmission and “computing capability” components under the *Third Way* approach, the fact will remain that wireless data roaming provided by a Roaming Partner is a telecommunications service properly regulated as common carriage under Title II. Conversely, a conclusion here that wireless data roaming is a regulatable telecommunications service need not impact the *Third Way* approach at all. Accordingly, the Commission can act on wireless data roaming without worrying about its collateral effect on the *Third Way* or being caught up in the inevitable litigation that will surround an adoption of the *Third Way*.

The reasons for this are two-fold. First, the Commission will have already determined that wireless data roaming provided by the Roaming Partner is a telecommunications service,

⁷⁵ *Id.*

⁷⁶ MetroPCS opposes use of the *Third Way*, or any other legal theory, to regulate broadband Internet services. *See* MetroPCS Comments, GN Docket No. 09-191, WC Docket No. 07-52, filed Jan. 14, 2010; MetroPCS Reply Comments, GN Docket No. 09-191, WC Docket No. 07-52, filed Apr. 19, 2010. MetroPCS believes that the Commission got it right the first time when it concluded that “information service” includes any transmission provided to the end user by the information services provider and the transmission component when offered only as part of an information service should not be required to be broken out and separately offered.

and a *Third Way* ruling requiring that Internet transmission services be viewed separately would not in any way disturb such a finding. Second, any *Third Way* approach would only be applicable to retail service offered to customers, an offering that is distinct from the wholesale wireless data roaming provided by the Roaming Partner.

Under the *Third Way*, the Commission would be changing its mind with a conclusion that the computing functionality and broadband transmission component of retail Internet access service must be acknowledged as two separate things in accordance with the dissenting opinion in *Brand X*.⁷⁷ But, in the case of wireless data roaming (as with voice roaming), the transmission component (a telecommunications service) and the computing functionality (an information service) are entirely separate. This fact makes any wireless data roaming regulations promulgated under the Commission's Title II authority consistent with prior Commission and Supreme Court decisions, and would not require a change in Commission policy or analysis.

Because automatic wireless data roaming and net neutrality present substantially distinct issues, they may be regulated on separate (yet complementary) jurisdictional bases. Adopting automatic wireless data roaming under its traditional Title II authority, as advocated by MetroPCS, will allow the Commission to take needed action in the near term to foster a robust wireless data roaming market, while preserving the ability pursue its *Third Way* proposal by allowing for public comment on such an approach in a separate proceeding.⁷⁸

The MetroPCS-proposed approach to wireless data roaming authority also is easily reconcilable with the recent *Comcast* decision. In the *Second FNPRM*, the Commission asks

⁷⁷ *Third Way* 3.

⁷⁸ At present, the Commission is scheduled to consider a *Notice of Inquiry* (“*NOI*”) on the *Third Way* approach at its June Commission meeting. MetroPCS has concerns regarding the possible unintended consequences following from the *Third Way* approach, but is reserving final judgment until the *NOI* is released.

commenters to address how the recent decision in *Comcast Corporation v. FCC*⁷⁹ – the decision that spawned the Commission’s *Third Way* proposal – affects the Commission’s authority to implement automatic wireless data roaming.⁸⁰ If the Commission decides to implement automatic wireless data roaming under its Title II authority as advocated by MetroPCS, the answer is that the *Comcast* decision has no bearing whatsoever on the Commission’s ability to do so. Indeed, one substantial benefit of regulating wireless data roaming under Title II is that this approach avoids the pitfalls that doomed the Commission in *Comcast*. In that case, the Commission sought to expand its authority to regulate Internet management practices by using ancillary authority it purported to have under Title I. The D.C. Circuit soundly rejected this approach.⁸¹ Unlike the Title I ancillary jurisdiction reasoning that came under fire in *Comcast*, regulating wireless data roaming under Title II contains none of the defects that dictated the reversal in *Comcast*.

In *Comcast*, the Commission sought authority under Title I to regulate an information service. With respect to wireless data roaming, the Commission need only regulate ordinary transmission provided by the Roaming Partner, long settled to be telecommunications. Coupled with the finding that wireless data Roaming Partners satisfy at least one prong, if not both prongs, of the *NARUC I* common carrier test,⁸² it becomes clear that the Commission can cleanly and simply regulate wireless data roaming under Title II.

⁷⁹ *Comcast Corporation. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (“*Comcast*”).

⁸⁰ *Second FNPRM* ¶ 65.

⁸¹ *Comcast*, 600 F.3d at 658 (finding that the Commission had not sufficiently “linked its action [taken under ancillary authority] to a statutory delegation of regulatory authority”).

⁸² The holding in *NARUC I* stands for the proposition that a service provider should be regulated as common carrier where: (i) the provider’s actions (*i.e.*, the indiscriminate offering of service) reflect the desire to serve the public indiscriminately as a common carrier; or (ii) the

By acting under Title II, the Commission is able to promulgate regulations governing wireless data roaming whose legal authority is grounded in specific long-standing and unchallenged statutory authority, therefore mitigating the risk of being overturned, as happened in *Comcast*. Using its Title II authority to implement automatic wireless data roaming, the Commission can avoid yet another protracted legal battle over the outer bounds of its Title I ancillary jurisdiction, and instead focus its attention on other rolling out additional initiatives that serve to promote and enhance broadband deployment.

It is especially important with respect to wireless data roaming that the Commission not use untested authority as a foundation for a finding that wireless data roaming provided by a Roaming Partner is a common carrier service. Since wireless data roaming is critical to the prompt roll out of advanced wireless broadband service, any delay resulting from endless appeals of a Commission decision would postpone and perhaps eliminate competition for wireless broadband services using 4G. The Title II approach advocated by MetroPCS is sound and would not be subject to serious legal challenge.

VI. CONSUMERS SHOULD NOT BE DENIED THE IMPORTANT BENEFITS OF NEEDED WIRELESS DATA ROAMING

The wireless industry is growing more dependant on wireless data with each passing day, and the Commission must assure that wireless data roaming is provided on a non-discriminatory basis and at just and reasonable rates. Without such a requirement, new entrants as well as small, rural and regional carriers, may not be willing to invest in 4G data networks, such as LTE, because their customers will be unable to use the service once they leave their home area.

Commission makes a determination that the public interest requires the service to be offered indiscriminately to the public. *NARUC I*, 525 F.2d at 642.

Wireless customers increasingly view the ability to have nationwide access to voice and data services as an integral part of their wireless experience, and being able to offer such access is a necessary precondition for a smaller competitor to be considered as a viable competitive alternative to AT&T, Verizon Wireless, Sprint Nextel and T-Mobile – also known as the “Big-4” carriers. Over the past few years, mobile data access has become so ingrained in consumer expectations that denying nationwide wireless data roaming would now be as damaging to competition as denying nationwide voice roaming would have been at the time that Commission released the *2007 Roaming Order*.⁸³ According to a recent Cisco study, it is estimated that global mobile data traffic grew at a rate of 157 percent between 2008 and 2009.⁸⁴ And, based on information provided by domestic carriers, the United States seems to be outstripping even this prolific growth rate.⁸⁵

Simply put, access to nationwide mobile data service is fast becoming table stakes in the wireless marketplace. As the Internet increasingly goes mobile, the ability to use data services while roaming will determine whether a carrier can compete for or retain customers. As a result, new entrants and small, rural and mid-tier carriers simply must be able to provide their customers with meaningful access to wireless data roaming, including next-generation broadband services such as LTE, at reasonable rates. Absent an improved ability to provide their customers with this necessary wireless data roaming service, new entrants and small, rural and mid-tier carriers may

⁸³ In the *Fourteenth Report*, the Commission cited AT&T’s report that data use on its network had increased 5,000 percent since between mid-2006 and mid-2009, and had increased an additional 400 percent between June 2008 and June 2009. *Fourteenth Report* ¶¶ 183.

⁸⁴ Cisco, *Cisco Virtual Networking Index: Global Mobile Data Traffic Forecast Update, 2009-2014*, http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-520862.html.

⁸⁵ See *supra*, n.83 (citing AT&T’s 400 percent increase in data traffic between June 2008 and June 2009).

not be able to compete effectively, and may well vanish from the marketplace over time, to the detriment of consumers nationwide.

It is not surprising that the two largest carriers oppose such a requirement, as their denial of such services is a necessary part of their desire to recreate a wireless duopoly. The only way to avoid this is to allow all carriers access to wireless data roaming on non-discriminatory terms and conditions at just and reasonable rates. Allowing the two largest wireless carriers to deny roaming services to the many customers of small, rural and mid-tier carriers is not consistent with the *National Broadband Plan*'s goal of ubiquitous broadband coverage for all Americans. Indeed, the *National Broadband Plan* specifically cites automatic wireless data roaming as a key component of universal broadband deployment.⁸⁶

Public safety and national security concerns also are implicated by the current wireless data roaming policy. Indeed, 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."⁸⁷ Consumers and first responders have grown accustomed to using their wireless devices in emergencies for both voice and data purposes, and may be shocked to find that their devices will not work when they need them most.⁸⁸ There can be no doubt that public safety is enhanced when consumers and first responders are able to access their data networks and the Internet from wherever they may travel.

⁸⁶ *National Broadband Plan* 35, 49.

⁸⁷ 47 U.S.C. § 151.

⁸⁸ 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.

A. An Automatic Wireless Data Roaming Requirement Will Enhance Competition in the Market for Wireless Services

Although wireless carriers compete locally for customers, customers increasingly are coming to expect their much-used data services to be available to them nationwide. Without the ability to offer nationwide data service, competition suffers. Wireless customers are by definition a mobile group, and accordingly, they expect their wireless handsets – including their data services – to travel with them outside of their local metropolitan area. Consumers do not, and should not be expected to, understand the intricacies of Commission wireless data roaming regulations. Consumers should not have to discover that their wireless data services may suddenly stop functioning in certain markets, and then reappear, seemingly at random, when they enter another market. Commissioner 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.”⁸⁹

In the context of voice roaming, Commission noted the importance of ensuring that “consumers’ reasonable expectations of seamless nationwide commercial telephony services through roaming” are met.⁹⁰ At the time that the *2007 Roaming Order* was released, the wireless data revolution was in its infancy. However, the Commission’s words ring as true today with respect to wireless data roaming as they did in 2007 with respect to voice roaming. The fundamental fact remains that that wireless carriers must provide their customers with nationwide service – both data and voice service – in order to compete effectively in today’s

⁸⁹ *2007 Roaming Order*, statement of Commissioner Michael J. Copps, approving in part, concurring in part, WT Docket No. 05-265, FCC 07-143 (rel. Aug. 16, 2007). Many handsets indicate when a customer is on its Home Carrier’s network or on a Roaming Partner network – but not whether data services will be supported. A customer would have to attempt to use a wireless data service when roaming in order to know whether or not the particular service would work.

⁹⁰ *2007 Roaming Order* ¶ 55.

wireless marketplace.⁹¹ If a customer is unable to receive data services from a particular carrier when they roam, it is unlikely the customer will buy service from that carrier. This simple restriction will deter small, rural and mid-tier carriers from investing in broadband at the exact time such investment is sorely needed to meet the objectives of the *National Broadband Plan*. The only way to ensure that this investment, and the resultant competition, occurs is to enable these 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. In light of this realization, it is clear that a competitive wholesale market for wireless data roaming services is critical to maintain a robustly competitive retail market for wireless services.

B. The Market for Wireless Data Roaming Services is Not Competitive

The market for wireless data roaming services is broken and is experiencing substantial market failure. The Commission took an important step recently in its *Fourteenth Report* by analyzing the wireless ecosystem as a whole (including upstream inputs, such as wireless data roaming services), as opposed to simply looking at the retail market for wireless services.⁹²

Taking this comprehensive view led the Commission to the significant conclusion that “[e]ach of the segments in the mobile wireless ecosystem has the potential to affect competitive and consumer outcomes in the mobile wireless services segment.”⁹³ Thus, by the Commission’s own reasoning, a failure in the market for wireless data roaming services – such as exists in the marketplace today – has the potential to adversely affect consumers and market competition as a

⁹¹ *Id.* ¶ 3, 27-28.

⁹² While MetroPCS believes that there are market failures with respect to critical inputs to the wireless industry, such as roaming, handsets, and spectrum, MetroPCS does believe that the retail market for wireless services is and remains highly competitive, with consumers from 96.1% of the United States having 3 or more facilities-based carriers to choose from. *Fourteenth Report* ¶ 42, Table 5.

⁹³ *Fourteenth Report* ¶ 9.

whole. The dominance of AT&T and Verizon Wireless in the market for wireless data roaming services should cause substantial consternation at the Commission, as it shows a non-functioning market that is in need of Commission intervention.

Viewing the separate markets for CDMA data roaming services, on the one hand, and for GSM data roaming services, on the other, reveals that AT&T⁹⁴ and Verizon Wireless⁹⁵ each have dominant positions in their respective air interfaces. Since the roaming market is technology-limited at the current time, a CDMA provider cannot feasibly obtain data roaming from a GSM carrier, and *vice versa*.⁹⁶ This exacerbates the difficulties that new entrants and small, rural and regional carriers face in negotiating fair roaming agreements, as they are limited as to who they may exchange wireless data roaming traffic with by virtue of their network technology. With the market power held by the largest two carriers, they are able to dictate both roaming rates and terms for access to new technologies – two critical areas in which other wireless players need to be on a level playing field in order to compete effectively. This market power also has the effect of deterring new entrants and depressing spectrum auction revenues because new entrants cannot afford to compete on a startup basis with well-entrenched players who have significant roaming

⁹⁴ The GSM market is even more concentrated, with AT&T serving over 85 million customers, while its next largest rival, T-Mobile, serves approximately 34 million. 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 data roaming services. *See Fourteenth Report 9.*

⁹⁵ With Verizon Wireless' consummation of its acquisition of Alltel, it has over 91 million CDMA customers. By comparison, Sprint Nextel, US Cellular, MetroPCS and Leap CDMA carriers serve only just over 65 million customers in the aggregate. This means that Verizon Wireless alone serves more than 58 percent of the CDMA market, giving it considerable market power with respect to data roaming services. *See Fourteenth Report 9.*

⁹⁶ 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. Further, unless wireless carriers other than AT&T and Verizon adopt LTE, the LTE roaming market would remain a near-duopoly for some time. Thus, this dominance will continue for the foreseeable future.

advantages. Unfortunately, the disappearance of a number of former small, rural and mid-tier roaming partners as a result of the recent market consolidation has made it much more difficult for small, rural and mid-tier carriers to negotiate reciprocal wireless data roaming agreements.⁹⁷

Due to the substantial market power that the two largest carriers enjoy in their respective air interfaces, they have little incentive to offer 3G wireless data roaming to competing providers – and their actions confirm these incentives. This leaves consumers with a distinctly unappealing choice – either forgoing their needed data services when travelling out of market, or forgoing the innovative pricing and service plans often offered by smaller, rural and mid-tier carriers. The Commission should spare consumers the unpleasant decision that this Morton’s Fork presents, and require that automatic wireless data roaming be made available to all carriers. This will enable all consumers to enjoy wireless data access across the nation, will enhance the wireless services offerings that competitive carriers are able to provide, and thus will promote competition across the industry as a whole.

Although both AT&T and Verizon Wireless have announced that they are moving to the LTE standard, rather than ameliorating the situation the coming of LTE will only magnify the extant market failure. As LTE becomes the nationwide standard for next-generation data services, smaller, rural and mid-tier carriers will be faced with a tough decision about whether or not to invest in this important new technology. An inability to offer nationwide LTE data services would serve as a substantial impediment to investment for these carriers. There is little reason to invest the necessary time and capital to construct a network that will only benefit your customers across a limited area. As discussed above, customers are not inclined to select a

⁹⁷ In many instances, the acquiring carriers have offered more favorable roaming arrangements through the acquiring carriers. For example, several carriers challenged the Verizon/Alltel transaction because Alltel offered more suitable roaming arrangements than Verizon.

carrier that provides them with only limited data coverage – when a customer selects a provider based on that provider’s LTE offering, you can be certain that such a customer expects that service to work nationwide. As a result, automatic wireless data roaming will actually incent smaller, rural and mid-tier carriers to invest in next-generation broadband facilities by allowing them to market nationwide LTE services to their customers.

In addition, it is not entirely clear that the two-carrier dominance in the current air interfaces will not be replicated in LTE. Sprint has not publicly announced that it plans to move to LTE and instead seems focused on using its investment in Clearwire, which uses WiMAX instead of LTE, as its 4G solution. T-Mobile has not publicly announced that it is going to deploy LTE and, given the current spectrum holdings of T-Mobile and paucity of additional spectrum, it may delay rolling out LTE for some time. Accordingly, even with the deployment of LTE there may still be limited choices for small, rural and mid-tier carriers to roam. Finally, although some of the mid-tier carriers other than MetroPCS have indicated that they may deploy LTE, the timing of any such roll-outs either is not public or so far in the future as to not help.⁹⁸ In order for the Commission to have LTE deployment now by small, rural and mid-tier carriers they need to know that they will have access to LTE once they have upgraded. Until they have that assurance, any decision to deploy LTE will inevitably be delayed.

Certain opponents of automatic wireless data roaming inevitably will re-hash old voice roaming concerns in an effort to thwart this needed regulation. These concerns center around the faulty assumption that imposing a wireless data roaming requirement may slow down deployments, as the operator of a nascent wireless broadband network may be less likely to construct facilities in new markets where automatic wireless data roaming on other networks is

⁹⁸ MetroPCS has already committed to rolling out LTE in selected metropolitan areas in the second half of 2010.

available. As MetroPCS and many other proponents of automatic wireless data roaming have pointed out, this argument is fundamentally flawed because it fails to adequately acknowledge that the host carrier is entitled to earn a profit on its wireless data roaming services. This means that there are substantial economic costs to a Home Carrier which opts to serve viable areas by using wireless data roaming agreements rather than by building its own facilities. Supporters of automatic wireless data roaming are not demanding free access to the Roaming Partner's network, nor any right to gain access at cost or at a cost-based or TELRIC rate. Rather, the Roaming Partner is able to assess a reasonable charge and, in ascertaining what is reasonable, the Commission can allow the host carrier to earn a sufficient profit to assure the Roaming Partner and Home Carrier have adequate economic incentives to build out high cost areas.

This fact, coupled with the right of a host carrier to earn a profit on its roaming services, makes it diseconomic in the long run for MetroPCS and similarly-situated carriers to opt to serve viable areas by roaming rather than by building. A carrier's ability to offer a fully competitive rate would always be hindered if they were paying a Roaming Partner a fee that included a profit margin. The reliance on automatic wireless data roaming will reduce in the short-term the Home Carrier's profits and increase their prices to their customers. Nevertheless, the long-term benefits will be worthwhile – additional market players will be able to remain in the game, investing funds in research and development of new technologies and building out their infrastructure over time – ultimately benefiting the consumer with more options and improved technologies at lower prices. Further, allowing automatic wireless data roaming serves to encourage new entrants and small, rural and mid-tier carriers that otherwise would not have the wherewithal to buy, build and operate large national networks.

The Commission also should not lose sight of the fact that there are many areas in the United States where the only carriers with coverage are the two largest carriers – and there is a

reason for that. In both cases, a significant portion of these networks were constructed with high cost universal service funds which were paid for by all CMRS customers. These supported carriers should not be able to reap the benefits of government subsidized build-out and at the same time deny the benefits to the very same customers who have had a hand in paying for it. Indeed, requiring wireless carriers who have accepted high cost Universal Service Fund monies to construct facilities to offer wireless data roaming is a simple way for the Commission to lawfully repurpose some of the previously spent Universal Service Funds to support wireless Internet access broadband deployment. There should be no serious legal challenge to such a repurposing since the initial grants were intended to support telecommunications services and, as such, under the proposed MetroPCS approach, that would still be the case, making the support properly payable from the Universal Service Fund.

Further, the Commission itself has recognized that there are geographic areas which would not support more than one or two carriers – especially if additional carriers would not be able to tap the federal funds to construct facilities.⁹⁹ The benefit conferred on the largest carriers, however, does not stop with the current facilities. In many cases, since the largest carriers already have existing facilities, they are able to upgrade to LTE at a significantly lower cost than new entrants – especially since much of the spectrum that was built-out is below 1 GHz. Finally, the Commission should not forget that the largest carriers, as result of Commission policies, were able to corner the market for 700 MHz spectrum – eliminating yet another avenue for new entrants and existing carriers to secure spectrum that would put them on more even footing with the two largest carriers.

⁹⁹ See *National Broadband Plan* 47 (noting that “it is not economically or practically feasible for competitors to build facilities in all geographic areas”).

Furthermore, with the rising importance of data services in connection with wireless services, carriers will need to deploy their own network if they want to be able to offer the data services being sought by the public. Since the wireless data roaming obligation will apply only to the transmission provided by the Roaming Partner and not to any data or information services provided by the Roaming Partner, small, rural and mid-tier carriers will remain incented to build out their networks in order to deploy their own information services. If small, rural and mid-tier carriers fail to do so, they will cease to be competitive. Accordingly, even with a right to automatic wireless data roaming, the Commission can and should expect that small, rural and mid-tier carriers will remain incented to build out their facilities wherever they hold licenses.

C. Automatic Wireless Data Roaming Should Be Required Irrespective of Technology or Services Being Offered in Home Markets

Any wireless data roaming solution will be incomplete if it contains loopholes for the two largest carriers to exploit in an effort to stymie the Commission's preference for automatic wireless data roaming. The Commission needs to state unequivocally that all types of automatic wireless data roaming must be provided irrespective of the type of services being offered in a customer's home market. Carriers have many different legitimate business and technological reasons for rolling out services in certain markets and not in others. For example, a carrier may not deploy a technology because it does not have sufficient spectrum to deploy such technology, or it may need the spectrum to service both existing customers and potential growth. A carrier also may not deploy a technology in one metropolitan area or another because the technology may be incompatible with existing uses or may cause interference to other licensees. Further, a carrier may not have sufficient funds or have immediate access to the capital necessary for them to invest in new technology at the current time. Finally, a carrier may deploy technology in order to have existing deployments pay for new deployments (*e.g.*, self-funded).

Such carriers should not be penalized for proceeding at a different pace on a different deployment schedule – and the Commission should not allow exceptions to automatic wireless data roaming requirements to determine winners and losers in the marketplace. Additionally, any exception allowing carriers to deny automatic roaming services based on services provided in a customer’s “home” market will also foster significant unnecessary litigation. The Commission would be required to make *ad hoc*, fact-specific determinations about what constitutes a customer’s “home market.” With an increasingly mobile citizenry, it is simply not sustainable for the Commission to be required to conduct factual inquiries into whether John Q. Public’s “home market” is San Francisco – therefore entitling him to LTE roaming services – or Pittsburgh – therefore limiting him to EV-DO roaming services.

The fact that wireless data roaming should be provided, where technically feasible, irrespective of whether the Home Carrier has deployed the same technology in its own network, will not cause the Roaming Partner any additional costs and is line with the current voice roaming obligation. Any automatic wireless data roaming obligation should be limited to compatible handsets. MetroPCS does not believe that it is necessary or appropriate to require any Roaming Partner to offer all air interfaces for wireless data roaming, just those that it offers its own customers in that market.¹⁰⁰ However, if a Home Carrier decides to deploy handsets which are compatible with and air interface different from what the Home Carrier uses in the subscriber’s home market, it should not be precluded from doing so.¹⁰¹ Indeed, small, rural and mid-tier carrier should be incented to deploy versatile handsets which will support the greatest

¹⁰⁰ To have such a requirement would impose unnecessary costs on the Roaming Partner.

¹⁰¹ The cost of versatile, multi-mode handsets may be significant, which could deter their deployment. However, the Commission should not discourage carriers from investing in such handsets if its makes economic sense for them to do so – especially since over time the Commission can expect that the costs of multi-mode handsets to eventually come own.

wireless data roaming coverage, regardless of the particular air interface used by the Home Carrier.¹⁰² Significantly, the current voice roaming obligation is not limited to the air interface used by the Home Carrier and the wireless data roaming obligation should be no more limited.

“Home” markets are not the only context in which it behooves the Commission to paint with broad strokes. The Commission should also specify that automatic wireless data roaming is not merely limited to existing wireless technologies. The Commission must make certain that any automatic wireless 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. There must be no room for doubt that the automatic wireless data roaming requirement covers all technically feasible speeds and compatible technologies, both currently available and available in the future. This is particularly important in light of the coming deployment of LTE data services, estimated to begin rolling out this year. LTE represents the latest in high-speed data access, and thus the Commission must extend automatic wireless data roaming to LTE and other future high-speed data innovations.

It is important that the Commission make clear that all new technologies are expected to reap the benefits of roaming. The best time to ensure that roaming can be done is when the technology is on the drawing boards and before it is deployed. Just as the Commission should make it clear that equipment must interoperate across all channels in a particular license band, the Commission should make clear that the wireless data roaming obligation applies to all existing and new technologies.

¹⁰² Allowing carriers to access air interfaces they have not deployed will not deter build-out of the carrier’s their own spectrum. As has been demonstrated time and time again, carriers are incented to build out their spectrum in places where they plan to sell since they have greater control over costs and over the services they provide.

Potential customers of new entrants and small, rural and mid-tier 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 wireless 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 wireless data roaming nationwide over their own spectrum. In order to create a truly competitive mobile wireless marketplace, the Commission must require automatic wireless data roaming, and allow new entrants, small, rural and regional carriers to compete on an even playing field for all wireless services.

D. Automatic Wireless Data Roaming Must Also Apply Broadly to All Non-CMRS Providers Offering Wireless Broadband Services

Due to the impressive speeds offered by 4G wireless broadband technologies, wireless broadband is quickly becoming a substitute for wired broadband in many American homes.¹⁰³ Consequently, providers such as Clearwire are becoming major players in the wireless data market. Clearwire holds upwards of 120 MHz of spectrum in most major United States markets, enabling it to provide robust broadband services to consumers across the country.¹⁰⁴ Clearwire has also entered into a wireless data joint venture partnership with Sprint Nextel in order to

¹⁰³ Clearwire, a wireless broadband-only provider, is presently advertising “average speeds of 3 to 6 Mbps and bursts over 10 Mbps.” Clearwire Frequently Asked Questions, *available at* <http://www.clear.com/support/faq>. This compares favorably to Verizon in-home DSL service, which offers three tiers of speeds – 1 Mbps, 3 Mbps and 7.1 Mbps. Verizon High Speed Internet, *available at* <http://www22.verizon.com/Residential/HighSpeedInternet/overview?CMP=DMC-CV090063>.

¹⁰⁴ Clearwire Corporation 8-K, Exhibit 99.1, “Clearwire Investor Presentation; June 2008,” 14, filed Jun. 12 2008 (indicating that Clearwire’s average nationwide spectrum position is greater than 120 MHz).

provide the company with 4G data services over the Clearwire WiMAX network.¹⁰⁵ Both of these facts make clear that broadband-only providers are, and will continue to be, an important part of the wireless ecosystem. To that end, it is important that the Commission apply automatic wireless data roaming to these non-CMRS providers as well.

E. Automatic Wireless Data Roaming Promotes and Enhances Broadband Deployment, in Accordance With the Goals of the *National Broadband Plan*

The Commission's recent *National Broadband Plan* has the noteworthy goal of promoting and enhancing broadband deployment to all corners of the United States.¹⁰⁶ This important goal is best met by ensuring that there is sufficient competition in the marketplace, as competition is the surest way to promote investment in necessary broadband networks. With respect to wireless, the Commission recently recognized in its *Fourteenth Report* that examining competition in the market for wireless services involves more than just taking a snapshot of the retail market each year. This year, for the first time, the Commission took into account the fact that the wireless ecosystem as a whole encompasses upstream components (including access to spectrum, such as through roaming agreements), and downstream elements (including devices and applications). These elements must work in harmony to foster competition and the resultant broadband deployment. Indeed, the Commission has recognized that “[e]ach of the segments in the mobile wireless ecosystem has the potential to affect competitive and consumer outcomes in the mobile wireless services segment.”¹⁰⁷

¹⁰⁵ “Clearwire, Sprint and Time Warner Cable to Expand 4G Mobile Broadband Service This Summer,” News Release, *available at* http://newsreleases.sprint.com/phoenix.zhtml?c=127149&p=irol-newsArticle_newsroom&ID=1422827&highlight=.

¹⁰⁶ *See generally National Broadband Plan.*

¹⁰⁷ *Fourteenth Report* ¶ 9.

Operating under this new understanding of the interdependency of the various layers of the wireless ecosystem, the *National Broadband Plan* correctly opined that “[d]ata roaming is important to entry and competition for mobile broadband services.”¹⁰⁸ MetroPCS strongly agrees with this statement – if new entrants and small, rural and mid-tier carriers are allowed access to incumbent networks, customers are provided with new choices. These new choices will spur innovation, investment, competition and, in turn, promote and enhance broadband deployment.

Automatic wireless data roaming is particularly important for promoting broadband deployment and adoption in underserved rural areas. As the *National Broadband Plan* states,

[f]ew, if any...networks will provide ubiquitous nationwide service entirely through their own facilities, particularly in the initial stages of construction and in rural areas. In order for consumers to be able to use mobile broadband services when traveling to areas outside their provider’s network, their provider likely will need to enter into roaming arrangements with other providers.¹⁰⁹

Low-density areas simply may not support facilities-based competition by more than one or two providers. Understanding this, the Commission must avoid designing policies – like refusing to grant automatic wireless data roaming rights – that force carriers to decide whether to build redundant and unnecessary facilities at great expense or to deprive their customers of needed nationwide wireless data services. The Commission itself has recognized that wireless data roaming is “crucial for enabling competition in the small business and enterprise customer segments, in mobile services and in deployment of services in high-cost areas.”¹¹⁰ In order to accomplish the *National Broadband Plan*’s goals, the Commission should heed its own words

¹⁰⁸ *National Broadband Plan* 49.

¹⁰⁹ *Id.* 49.

¹¹⁰ *Id.* 35.

and immediately grant automatic wireless data roaming rights for all wireless carriers, where technically feasible.

The *National Broadband Plan* contains numerous goals, plans and recommendations, many of which necessitate billions of dollars in government spending. However, the Commission has before it a cost-free way to immediately extend wireless broadband services to millions upon millions of consumers in an instant – automatic wireless data roaming rights. The grant of automatic wireless data roaming rights will instantly extend the networks of small, rural and mid-tier carriers, sparking new broadband adoption among their customers. Automatic wireless data roaming will also incent such small, rural and mid-tier carriers to invest in their own next-generation networks, such as LTE, confident in the knowledge that their customers will be able to roam freely along with their advanced wireless services.

VII. CONCLUSION

The foregoing premises having been duly considered, MetroPCS respectfully requests that the Commission adopt a requirement that all providers of wireless broadband services are obligated to provide wireless data roaming services to any requesting carrier using compatible technology when such roaming is technically feasible and economically reasonable.

Respectfully submitted,

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