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Before the
Federal Communications Commission
Washington, D.C. 20554

MAILED

APR 26 2010

In the Matter of)

Reexamination of Roaming Obligations of)
Commercial Mobile Radio Service Providers and)
Other Providers of Mobile Data Services)

WT Docket No. 05-~~FCC~~ Mail Room

**ORDER ON RECONSIDERATION
AND
SECOND FURTHER NOTICE OF PROPOSED RULEMAKING**

Adopted: April 21, 2010

Released: April 21, 2010

Comment Date: (45 days after publication in the Federal Register)

Reply Comment Date: (75 days after publication in the Federal Register)

By the Commission: Chairman Genachowski and Commissioners Copps, McDowell, Clyburn and Baker
issuing separate statements.

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I. INTRODUCTION

1. In this order, we take action to increase consumers' access to seamless nationwide mobile services, wherever and whenever they choose, and to promote investment, innovation, and competition in mobile wireless services. In the Order on Reconsideration, we create a framework for voice roaming that will encourage carriers of all sizes to reach reasonable commercial roaming agreements, while also encouraging these carriers to continue investing in the coverage and capacity of their networks. We will adjudicate any disputes that may arise between carriers through a tailored, fact-based process. In the Second Further Notice, consistent with the recommendation of the National Broadband Plan, we open an examination of the critical issue of data roaming, by seeking comment on the rules that should apply to roaming for mobile data services such as mobile broadband service. Mobile data communications present great promise for the Nation for driving the economy and delivering broadband opportunities to all Americans. Our goal is for this country to lead the world in such mobile services by ensuring that consumers have access to competitive broadband data services over the fastest and most extensive competitive wireless broadband data networks.

2. First, in the Order on Reconsideration, we modify the automatic roaming obligation that the Commission adopted for voice and related services in 2007 by eliminating the home roaming exclusion¹. With this decision, we continue to strive to adopt policies that balance competing interests, including -- promoting competition among multiple carriers; ensuring that consumers have access to seamless coverage nationwide; and providing incentives for all carriers to invest and innovate by using available spectrum and constructing wireless network facilities on a widespread basis. Upon reconsideration, we find that an up-front, categorical exclusion of home roaming from the automatic roaming obligation does not strike the best balance in furthering these goals. As a result of our decision, home roaming will be subject to the automatic roaming requirement and, as a common carrier service, is subject to Sections 201 and 202 of the Act. We will apply the same general presumption of reasonableness to requests for home roaming that we apply to other requests for automatic roaming, and take into account the competing interests when addressing roaming disputes on a case-by-case basis. Specifically, we establish a general presumption that a request for automatic roaming is reasonable, in the first instance, if a requesting CMRS carrier's network is technologically compatible with the would-be host carrier's network, and we will require a CMRS carrier receiving a reasonable request to provide automatic roaming on reasonable and not unreasonably discriminatory terms and conditions. The general presumption of reasonableness, however, is rebuttable, and parties may choose to bring roaming disputes to the Commission for resolution. We will address such disputes on a case-by-case basis, taking into consideration the totality of the circumstances presented to determine whether requiring a roaming agreement would best further our public interest goals in such particular case.

3. Second, we address in a Second Further Notice of Proposed Rulemaking whether to extend roaming obligations to data services that are provided without interconnection to the public switched network -- including mobile broadband services. Broadband deployment is a key priority for the

¹ Roaming arrangements between commercial mobile wireless services carriers allow customers of one mobile wireless carrier to automatically receive service from another carrier's network when they are in areas that their carrier's network does not cover.

Commission, and the deployment of mobile data networks will be essential to achieve the goal of making broadband connectivity available everywhere in the United States. We also seek to foster competition and the development of mobile data services with seamless and ubiquitous coverage. Ubiquitous coverage will enhance the unique social and economic benefits that a mobile service provides by enabling consumers to access information wherever they are, while competition will help to promote investment and innovation and protect consumer interests. We seek to develop a more detailed and updated record before we make a final determination regarding broadband data roaming. In 2007, the Commission sought comment on this issue in a five-paragraph *Further Notice*. In response, parties filed certain specific proposals regarding the rules, if any, that should govern roaming for mobile data services. Since that time, there have been numerous developments in the industry and advancements in technology that are likely to be relevant to our analysis, and that have affected at least one party's positions in this proceeding. To help us determine the right approach for mobile broadband roaming, we want to ensure that such developments are fully incorporated into our decision making on this important issue. Accordingly, we seek comment on the specific, concrete proposals offered in response to the 2007 Further Notice, as well as seeking additional proposals that parties may choose to offer response to the Second Further Notice. In addition, we expand the scope of our proceeding by seeking comment on obligations governing the provision of roaming for such data services by providers that are not CMRS carriers as well as by providers that also provide CMRS services.²

II. BACKGROUND

4. Since 1996, the Commission has required that cellular, broadband Personal Communications Services (PCS), and certain Specialized Mobile Radio (SMR) providers make manual roaming service available upon request to customers of other carriers, provided that the roamers' handsets are "technically compatible" with the roamed-on network.³ In the *Roaming NPRM* adopted in 2005, the Commission sought to develop a record with up-to-date information regarding the state of the CMRS marketplace in an effort to determine whether there was a need for a regulatory regime for roaming services.⁴ Based on the

² We have also modified the title for WT Docket No. 05-265, which was previously "Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers," to now read "Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services," reflecting the expanded scope of this proceeding.

³ See *Interconnection and Resale Obligations of Commercial Mobile Radio Service Providers*, CC Docket No. 94-54, *Second Report and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 9462, 9468-69 ¶ 10 (1996) (*Interconnection and Resale Order*); 47 C.F.R. § 20.12(c).

⁴ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, *Memorandum Opinion & Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 15047 (2005) ("*Roaming MO&O*" and "*Roaming NPRM*" respectively). There are two forms of roaming services-- manual and automatic. With manual roaming, the subscriber must establish a relationship with the host carrier on whose system he or she wants to roam in order to make a call. See *Reexamination NPRM*, 20 FCC Rcd at 15049 ¶ 3. Typically, the roaming subscriber accomplishes this in the course of attempting to originate a call by giving a valid credit card number to the carrier providing the roaming service. By contrast, with automatic roaming, the roaming subscriber is able to originate or terminate a call without taking any special actions. *Id.* Automatic roaming requires a pre-existing contractual agreement between the subscriber's home system and the host system. *Id.*

record developed in response to the *Roaming NPRM*, the Commission adopted the *2007 Report and Order* in August 2007.⁵

5. In the *2007 Report and Order*, the Commission clarified that automatic roaming is a common carrier obligation for CMRS carriers, requiring them to provide roaming services to other carriers upon reasonable request on a just, reasonable, and non-discriminatory basis pursuant to Sections 201 and 202 of the Communications Act.⁶ The Commission found that, if a CMRS carrier receives a reasonable request for automatic roaming, pursuant to Section 332(c)(1)(B) and Section 201(a), it serves the public interest for that CMRS carrier to provide automatic roaming service to the requesting carrier on reasonable and nondiscriminatory terms and conditions.⁷ To provide guidance as to the reasonableness of automatic roaming requests, the Commission established the presumption that a request for automatic roaming is reasonable, in the first instance, if the requesting carrier's network is technologically compatible with the host carrier's network and the request involves automatic roaming services outside of the requesting carrier's home market(s).⁸ The Commission also codified this automatic roaming obligation in section 20.12(d) of its rules.⁹ At the same time, the Commission established a home roaming exclusion relating to this automatic roaming obligation, stating that a would-be host CMRS carrier is not required to provide automatic roaming to a requesting CMRS carrier in the requesting carrier's home market.¹⁰ The Commission defined the requesting carrier's home market to include any geographic location where that carrier has a wireless license or spectrum usage rights (e.g., spectrum leasing arrangements) that could be used to provide CMRS.¹¹

6. Regarding the scope of the automatic roaming obligation, the Commission found that the services covered by the automatic roaming obligation are the same services that had expressly been subject to manual roaming and other regulatory obligations – namely, real-time, two-way switched voice or data services, provided by CMRS carriers, that are interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls.¹² The Commission also decided to apply an automatic roaming obligation to the provision of push-to-talk and text-messaging services.¹³

⁵ Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817 (2007) (“*2007 Report and Order*” and “*2007 Further Notice*” respectively).

⁶ *2007 Report and Order*, 22 FCC Rcd at 15818 ¶ 1.

⁷ *Id* at 15827 ¶ 26.

⁸ *Id* at 15831 ¶ 33.

⁹ *Id* at 15840 ¶ 63; 47 C.F.R. §§ 20.3, 20.12(d).

¹⁰ *See 2007 Report and Order*, 22 FCC Rcd at 15835 ¶ 48.

¹¹ *Id*; 47 C.F.R. § 20.3.

¹² 47 C.F.R. § 20.12(a)(2). The Commission has used this formulation to define the scope of CMRS carriers, and services subject to certain regulatory obligations, including E911, 47 C.F.R. § 20.18(a), Hearing Aid Compatibility, 47 C.F.R. § 20.19(a), and manual roaming, 47 C.F.R. § 20.12(a). It initially developed this standard to define the subset of CMRS carriers that would be subject to the Commission's resale requirements, which have sunset. *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, *First Report and Order*, 11 FCC Rcd 18455, 18464 ¶ 16 (1996). The Commission noted that CMRS carriers not meeting this definition, such as local dispatch providers that also permitted interconnected calls over a non-cellular (continued....)

7. At that time, the Commission declined to extend the scope of the automatic roaming obligation to include non-interconnected services, such as wireless broadband Internet access services.¹⁴ The Commission stated that it was premature to impose any roaming obligation on data services that are not CMRS and not interconnected to the public switched network.¹⁵ Instead, the Commission sought comment on the issue in a short further notice of proposed rulemaking (*2007 Further Notice*).¹⁶

8. We received five petitions for reconsideration of the *2007 Report and Order*, four oppositions to the petitions, five replies to the oppositions, and three comments in support of the petitions.¹⁷ In their respective petitions for reconsideration, Leap Wireless, MetroPCS, SpectrumCo, Sprint Nextel, and T-Mobile each ask us to reconsider the ruling that host CMRS carriers are not obligated to provide automatic roaming in the requesting carrier's home markets.¹⁸ In addition, Sprint Nextel requests that we reconsider the decision to extend automatic roaming obligations to push-to-talk services.¹⁹ Finally, SpectrumCo asks us to reconsider the decision to limit the automatic roaming obligation only to services that use the public switched network.²⁰

III. ORDER ON RECONSIDERATION

9. In this Order on Reconsideration, we first eliminate the home roaming exclusion adopted in 2007. Instead, we will treat requests for automatic roaming in home markets under the same framework as other requests for automatic roaming. Second, we deny Sprint Nextel's request to reconsider the decision to extend automatic roaming obligations to push-to-talk. Finally, we address the issues raised in SpectrumCo's petition for reconsideration in the Second Further Notice below.

A. Elimination of Home Roaming Exclusion

10. In this Order on Reconsideration, we strive to adopt policies that balance competing interests of promoting competition, encouraging new entry, protecting consumers, and fostering investment. As discussed below, however, these goals are sometimes in tension. To best further these goals, we eliminate the home roaming exclusion and generally presume that a request for automatic roaming will be reasonable in the first instance if the requesting carrier's network is technologically compatible. This general presumption of reasonableness, however, is rebuttable. We find that such presumption of

(Continued from previous page) _____
system configuration or one-way interconnected voice services, "do not compete substantially with cellular and broadband PCS providers," and therefore decided not to impose any resale requirements on those carriers. *Id.*

¹³ *Id.*

¹⁴ *2007 Report and Order*, 22 FCC Rcd at 15839 ¶ 60.

¹⁵ *Id.*

¹⁶ *Id.* at 15839 ¶ 60, 15845 ¶ 77.

¹⁷ See Appendix B for the list.

¹⁸ See, e.g., Leap Wireless Petition for Reconsideration at 4-19; MetroPCS Petition for Reconsideration at 4-9; SpectrumCo Petition for Reconsideration at 3-10; Sprint Nextel Petition for Reconsideration at 7-10; T-Mobile Petition for Reconsideration at 1-8; Leap Wireless Reply to Opposition at 1-10; MetroPCS Reply to Opposition at 2-8; SpectrumCo Reply to Opposition at 4; Sprint Nextel Reply to Opposition at 9-10; and T-Mobile Reply to Opposition at 1-7.

¹⁹ See Sprint Nextel Petition for Reconsideration at 2-7; Sprint Nextel Reply to Opposition at 1-8.

²⁰ See SpectrumCo Petition for Reconsideration at 1-15; SpectrumCo Reply to Opposition at 4-5.

reasonableness will facilitate all roaming arrangements between carriers, including those for home roaming, ultimately benefiting consumers. Yet, in the event of a dispute, it also will allow us to take into consideration the totality of the circumstances presented to determine whether requiring a roaming agreement would best further our public interest goals in such particular case.

1. Background

11. In the *2007 Report and Order*, the Commission clarified, and codified in its rules, that automatic roaming is a common carrier service subject to the protections of Sections 201 and 202 of the Communications Act.²¹ In particular, the Commission determined that, when a reasonable request is made by a technologically compatible CMRS carrier, a host CMRS carrier is obligated under Sections 332(c)(1)(B) and 201(a) to provide automatic roaming on a just, reasonable, and non-discriminatory basis to the requesting carrier outside of the requesting carrier's home market.²² The Commission defined the home market as any geographic location where the requesting carrier has a wireless license or spectrum usage rights that could be used to provide CMRS.²³ In excluding home roaming, the Commission found that imposing an automatic roaming obligation in home markets where the requesting carrier already has the spectrum to compete directly with the would-be host carrier would not serve the public interest.²⁴ In reaching this decision, the Commission found "requiring home roaming could harm facilities-based competition and negatively affect build-out in these markets, thus adversely impacting network quality, reliability and coverage."²⁵ The Commission also, however, recognized the importance of home roaming and encouraged all CMRS carriers to negotiate automatic roaming in home markets, stating that its decision should not be construed as prohibiting a requesting carrier from seeking to negotiate home roaming agreements.²⁶

12. In their petitions for reconsideration, Sprint Nextel, T-Mobile, MetroPCS, Leap Wireless, and SpectrumCo each ask us to reconsider the Commission's ruling that host carriers are not obligated to provide automatic roaming to a requesting carrier in any areas where the requesting carrier holds a wireless license or leases spectrum, and to eliminate the home roaming exclusion.²⁷ In support of the petitions for reconsideration filed by MetroPCS and Leap Wireless, three parties -- Blooston Rural Carriers (Blooston) and Rural Telecommunications Group (RTG), and U.S. Cellular Corporation (U.S. Cellular) -- filed comments in support of the petitions for reconsideration.²⁸ Others also urge us to

²¹ *2007 Report and Order*, 22 FCC Rcd at 15826 ¶ 23.

²² *See 2007 Report and Order*, 22 FCC Rcd at 15831, 15835-37 ¶¶ 33, 48-55.

²³ *See* 47 C.F.R. § 20.3 (stating that a home carrier is the facilities-based CMRS carrier which requests automatic roaming service from a host carrier on behalf of its customers).

²⁴ *2007 Report and Order*, 22 FCC Rcd at 15835 ¶ 49.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *See, e.g.*, Leap Wireless Petition for Reconsideration at 4-19; MetroPCS Petition for Reconsideration at 4-9; SpectrumCo Petition for Reconsideration at 3-10; Sprint Nextel Petition for Reconsideration at 7-10; T-Mobile Petition for Reconsideration at 1-8; Leap Wireless Reply to Opposition at 1-10; MetroPCS Reply to Opposition at 2-8; SpectrumCo Reply to Opposition at 4; Sprint Nextel Reply to Opposition at 9-10; and T-Mobile Reply to Opposition at 1-7.

²⁸ *See, e.g.*, Blooston Comments at 2-4; RTG Comments at 2-10; and U.S. Cellular Comments at 1-7.

eliminate the home roaming exclusion.²⁹ AT&T and Verizon Wireless filed oppositions to the petitions, supporting the Commission's 2007 decision with respect to home roaming.³⁰

13. In seeking reconsideration, petitioners challenge the Commission's policy rationale for excluding home roaming from the automatic roaming obligation, which was based on the public interest goal of encouraging facilities-based competition and services. They dispute that the home roaming exclusion is justified to protect incentives to invest and buildout in rural areas, asserting that in many such areas with very low population densities, it is uneconomic for an additional carrier to build out, especially when the carrier only has access to upper band spectrum.³¹ They similarly assert it is infeasible for carriers offering service on a nationwide or broad regional basis to construct networks that cover 100 percent of their territories.³²

14. Conversely, petitioners argue that the home roaming exclusion may itself reduce investment in network construction and facilities-based competition.³³ They also argue the Commission's decision to establish the home roaming exclusion fails to recognize the impediments new entrants face in constructing their networks,³⁴ and state the failure to address this barrier to entry will disproportionately

²⁹ See, e.g., Letter from Gigi Sohn, President, Public Knowledge on behalf of the Public Interest Spectrum Coalition to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Aug. 13, 2008 and Letter from Coral Wireless d/b/a MobiPCS, Corr Wireless Comm., LLC, Leap Wireless International, Inc., MetroPCS Communications, Inc., NTCA, OPASTCO, NTELOS, Inc., Revol Wireless, Rural Cellular Association, Rural Telecommunications Group, Inc., and Southern Communications Services, Inc. d/b/a SouthernLINC Wireless, to the Hon. Julius Genachowski, Chairman, FCC, WT Docket No. 05-265, filed July 28, 2009 at 3.

³⁰ See, e.g., AT&T Opposition to Petitions for Reconsideration at 2-10; Verizon Wireless Opposition to Petitions for Reconsideration at 1-10. As discussed more fully elsewhere in this *Order on Reconsideration*, in later filings Verizon Wireless and, to a lesser extent, AT&T, suggest that they would not object to a home roaming requirement in certain limited circumstances.

³¹ See, e.g., Letter from William F. Maher, Jr., Counsel, T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, Dec. 15, 2009 at 1 (T-Mobile Dec. 15, 2009 *Ex Parte*); Sprint Petition for Reconsideration at 2; Letter from Maria L. Cattafesta, Senior Counsel, Government Affairs, Sprint Nextel, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Dec. 17, 2009 (Sprint Nextel Dec. 17, 2009 *Ex Parte*) at 3. To highlight the importance of roaming to both carriers and consumers, Sprint Nextel subsequently submitted in a later *ex parte* filing some data from *CTIA's June 2009 Wireless Industry Indices*, including the following regarding roaming billable minutes of use ("MOUs") for the first half of 2009 which totaled 66,382,209,607,5 representing 6.1 percent of all reported MOUs for that same period and which is a significant increase from the 59,706,618,5937 roaming billable MOUs reported for the first half of 2008, representing 5.3 percent of all reported MOUs for that period. See Letter from Maria L. Cattafesta, Senior Counsel, Government Affairs, Sprint Nextel, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed January 20, 2010 at 2.

³² See, e.g., T-Mobile Petition for Reconsideration at 1, 3-6.; Leap Wireless Petition for Reconsideration at 6. See also Sprint Petition for Reconsideration at 2; MetroPCS Petition for Reconsideration at 17.

³³ See, e.g., T-Mobile Dec. 15, 2009 *Ex Parte* at 1-2. Should the Commission entertain offering only temporary relief from the home roaming exclusion as opposed to eliminating the exclusion completely, T-Mobile states it would reduce its incentives to engage in rural build-out since it will not be assured that reasonably priced roaming will be permanently available in adjacent areas. *Id.*

³⁴ See, e.g., SpectrumCo Petition for Reconsideration at 3-10; Leap Wireless Petition for Reconsideration at 4-5; RTG and OPASTCO Comments at 9; Letter from Carl W. Northrop, Paul, Hastings, Janofsky & Walker, LLP, on behalf of MetroPCS, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Nov. 5, 2009 at 1-2 (MetroPCS Nov. 5, 2009 *Ex Parte*). See also Letter from Philip Verveer to Marlene Dortch dated July 24, 2008 in WT Docket 05-265; MetroPCS Petition for Reconsideration at 8 and U.S. Cellular Comments at 4.

harm rural consumers.³⁵ Petitioners also assert that building a competitive system as a new entrant can be time consuming due to the increasing difficulty of finding suitable sites and obtaining all of the local, state, and federal regulatory approvals necessary to put the sites to use.³⁶ Several petitioners assert the exclusion will particularly hurt those new entrants whose spectrum is in an area that must be cleared before it is available for commercial use.³⁷ In addition, petitioners assert the home roaming exclusion changed the status quo with regard to carriers' previously existing practices in negotiating roaming agreements, and it may result in reduction in the availability of such arrangements and harm to carriers whose business plans were formed in reliance on the previous regime.³⁸ Some assert that availability of roaming services has also diminished as a result of CMRS consolidation.³⁹

15. In contrast to petitioners, both AT&T and Verizon Wireless initially urge the Commission to retain the home roaming rules as adopted.⁴⁰ AT&T disagrees with arguments that the Commission was precluded from excluding home roaming because it deemed automatic roaming to be a common carrier

³⁵ See, e.g., Letter from James H. Barker and Barry J. Blonien, Latham & Watkins, LLP, and Pantelis Michalopoulos and Marc Paul, Steptoe & Johnson, LLP, on behalf of Leap Wireless, to Marlene Dortch, Secretary, FCC, WT Docket Nos. 08-95 and 05-265, filed May 19, 2009 at 10 (Leap Wireless May 19, 2009 *Ex Parte*). See also Leap Wireless Reply at 10 (providing an expert report finding that the home roaming exclusion will compound market failure in areas where competition is most at risk: rural, high cost, and hard-to reach areas). See also Attachment at 17, RTG *Ex Parte* to Marlene Dortch, Secretary, FCC from Caressa Bennet, Bennet & Bennet, filed July 16, 2009, attaching Reply Comments filed on July 13, 2009 in the Commission's 14th CMRS Competition Report proceeding (WT Docket No. 09-66) (for subscribers of some small and rural carriers without relief, in part, from the home roaming exclusion, RTG states that, in order to achieve continuation of the same speeds and services to which subscribers are accustomed in their home coverage area, it is likely they will be forced to purchase the services and devices of another major CMRS operator in addition to their small or rural provider's services (meaning they will need two handsets and two service plans).

³⁶ See MetroPCS Petition for Reconsideration at 8. U.S. Cellular agrees and notes that it is generally far more difficult than it was decades ago to construct wireless base stations, owing to increased regulatory scrutiny from all levels of government and increased opposition to wireless towers by some members of the public. U.S. Cellular Comments at 4.

³⁷ See SpectrumCo Petition for Reconsideration at 4; MetroPCS Petition for Reconsideration at 7, 16; T-Mobile Petition for Reconsideration at 6; Leap Wireless Petition for Reconsideration at 2.

³⁸ See Letter from Kathleen O'Brien Ham, Vice President Federal Regulatory Affairs, T-Mobile to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Aug. 7, 2008 at 2, 4; Leap Wireless Petition for Reconsideration at 3-4, 14-15. See also Letter from Kathleen O'Brien Ham, Vice President Federal Regulatory Affairs, T-Mobile to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed June 18, 2009 at 1 (T-Mobile June 18, 2009 *Ex Parte*); Letter from James H. Barker on behalf of Leap Wireless to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed July 23, 2008 at 1-3; Letter from Carl W. Northrop, Paul, Hastings, Janofsky & Walker, LLP, on behalf of MetroPCS, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed August 14, 2008 at 5.

³⁹ See, e.g., MetroPCS Reply at 4 n. 10; Letter from Kathleen O'Brien Ham to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Nov. 30, 2009 (T-Mobile Nov. 30, 2009 *Ex Parte*) at 3. See also White Paper entitled Economic Analysis of the Provision of Roaming Service in the Wireless Service Industry, attached to the T-Mobile Nov. 30, 2009 *Ex Parte* at 9-11 (stating that, in the last eight years, there have been important changes in the ownership structure in the wireless service markets, particularly with respect to several important regional network operators that have been acquired by other firms such as, for example, ALLTEL, Dobson, Edge and RCC in more recent years, and noting the firms that own large shares of these previously-independent networks are now more in direct competition in the consumer market with providers looking to extend their coverage via roaming).

⁴⁰ AT&T Opposition at 3. See also Verizon Wireless Opposition at 4.

service subject to Sections 201 and 202 of the Act,⁴¹ and states the Commission appropriately determined that a home roaming requirement would undermine facilities-based service and discourage competition based on coverage and service quality.⁴² According to AT&T, the argument that denial of home roaming will deter new entrants is unavailing, because neither automatic roaming nor home roaming has ever been required before, and the petitioners were willing to enter the CMRS market without an automatic roaming requirement in place at the time.⁴³ Finally, AT&T also argues that, in essence, petitioners seek the ability to resell the service of facilities-based carriers in the markets in which they hold licenses.⁴⁴ Similarly, in its opposition, Verizon Wireless initially argues repealing the home roaming exclusion would undermine the clear pro-competitive benefits that flow from carriers differentiating themselves on the basis of superior coverage in the home market, and would also undermine the requesting carriers' incentive to build network facilities to improve coverage in their areas.⁴⁵ Verizon Wireless also initially argues the home roaming exclusion should be retained because it encourages build-out in high cost areas and serves the public interest by allowing carriers that have made the investment to construct facilities in high cost areas to differentiate themselves on the basis of superior coverage.⁴⁶

16. However, in *ex parte* submissions filed after the close of the pleading cycle on reconsideration, Verizon Wireless and, to a lesser extent, AT&T suggest that they would not object to a home roaming requirement in certain limited circumstances. In its August 8, 2008 *ex parte*, for example, AT&T continues to argue that the home roaming exclusion promotes competition and innovation but concedes, to the extent a carrier holds encumbered AWS-1 and/or 700 MHz spectrum, limited relaxation of the home roaming exclusion may be appropriate.⁴⁷ In its July 23, 2009 *ex parte*, Verizon Wireless proposes a rule under which a host carrier would be required to offer automatic roaming to any requesting carrier for a period of two years in any area where the requesting carrier holds spectrum but does not offer service.⁴⁸ Verizon Wireless's proposed rule would also provide an additional one year of home roaming (for a total of three years) if the requesting carrier has met build-out requirements.⁴⁹

17. A number of parties submitted more recent *ex parte* filings reiterating their requests for the Commission to eliminate the home market exclusion.⁵⁰ In its December 11, 2009 *ex parte* filing, AT&T

⁴¹ AT&T Opposition at 10.

⁴² AT&T Opposition at 3-6. *See also* Verizon Wireless Opposition at 4-6.

⁴³ AT&T Opposition at 6.

⁴⁴ AT&T Opposition at 7.

⁴⁵ Verizon Wireless Opposition at 4-5.

⁴⁶ Verizon Wireless Opposition at 8. Verizon Wireless also initially contended the competitive marketplace will continue to lead carriers to negotiate automatic roaming agreements even where not required under the Commission's rules. Verizon Wireless Opposition at 10.

⁴⁷ Letter from M. Robert Sutherland, AT&T, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Aug. 8, 2008 at 1, 3-4.

⁴⁸ Verizon Wireless July 23, 2009 *Ex Parte*, Attachment at 2.

⁴⁹ *Id.*

⁵⁰ *See* T-Mobile Nov. 30, 2009 *Ex Parte*, and attached paper, *Economic Analysis of the Provision Of Roaming Services in the Wireless Service Industry*, Dr. Andrzej Skrzypacz, Professor of Economics, Stanford University Graduate School of Business, WT Docket No. 05-265; Letter from Carl W. Northrop, Paul, Hastings, Janofsky & Walker, LLP, on behalf of MetroPCS, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Dec. 8, (continued....)

responds to these more recent requests to eliminate the home roaming exclusion, arguing that competition and voluntarily negotiated roaming arrangements flourished prior to the *2007 Report and Order* and continue to flourish today.⁵¹

2. Discussion

18. Based on the record before us, we conclude that it is in the public interest to modify our rules with respect to automatic roaming by eliminating the home roaming exclusion that the Commission previously applied to the automatic roaming requirement for voice and related services.⁵² Thus, we will presume a request for automatic roaming to be reasonable, in the first instance, if the requesting carrier's network is technologically compatible, regardless of whether the request is for areas inside or outside of the requesting carrier's home market, and we will require a CMRS carrier receiving a reasonable request to provide automatic roaming service to the requesting carrier on reasonable and not unreasonably-discriminatory terms and conditions. We continue to support the goal of promoting facilities-based competition by providing incentives for carriers to construct wireless network facilities on the spectrum available to them. Upon reconsideration, however, we conclude that the up-front categorical home roaming exclusion adopted by the *2007 Report and Order* would in many circumstances discourage, rather than encourage, the facilities-based competition it sought to promote. We also remain mindful of the need in the roaming context to balance a number of competing interests, including -- promoting competition (including facilities-based competition), encouraging new entry, protecting consumers, and fostering innovation and investment.

19. Although some parties have advocated that we modify the home market exclusion in any of a number of ways, for example, by delaying its applicability for some period after a carrier obtains an initial spectrum license, we decide that the better and simpler course is to eliminate the exclusion and address in particular cases the competing interests, including the concerns that motivated the adoption of the

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2009 (MetroPCS Dec. 8, 2009 ex parte); Letter from William F. Maher, Jr., Counsel, T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, Dec. 15, 2009 (T-Mobile Dec. 15, 2009 ex parte); Letter from Carl W. Northrop, Paul, Hastings, Janofsky & Walker, LLP, on behalf of MetroPCS, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Dec. 17, 2009; Letter from Matthew F. Wood, Associate Director, Media Access Project, on behalf of Consumers Union, Free Press, and Media Access Project, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Dec. 17, 2009 (Public Interest Participants Dec. 17, 2009 ex parte); Letter from Maria L. Cattafesta, Senior Counsel, Government Affairs, Sprint Nextel, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Dec. 17, 2009 (Sprint Nextel Dec. 17, 2009 ex parte); Letter from Carl W. Northrop, Paul, Hastings, Janofsky & Walker, LLP, on behalf of MetroPCS, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Jan. 6, 2010 (MetroPCS Jan. 6, 2010 ex parte); Letter from Caressa D. Bennet, on behalf of Rural Telecommunications Group, Inc., to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Jan. 27, 2010.

⁵¹ *Ex Parte* from Michael P. Goggin, AT&T, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Dec. 22, 2009 at 1 (AT&T Dec. 22, 2009 *Ex Parte*).

⁵² *See, e.g.*, Leap Wireless Petition for Reconsideration & Reply; MetroPCS Petition for Reconsideration & Reply; SpectrumCo Petition for Reconsideration & Reply; Sprint Nextel Petition for Reconsideration & Reply; T-Mobile Petition for Reconsideration & Reply; RTG/OPASTCO Comments; Blooston Rural Carriers' Comments; U.S. Cellular Comments; Letter from Gigi Sohn, President, Public Knowledge on behalf of the Public Interest Spectrum Coalition to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Aug. 13, 2008; Letter from Coral Wireless d/b/a MobiPCS, Corr Wireless Comm., LLC, Leap Wireless International, Inc., MetroPCS Communications, Inc., NTCA, OPASTCO, NTELOS, Inc., Revol Wireless, Rural Cellular Association, Rural Telecommunications Group, Inc., and Southern Communications Services, Inc. d/b/a SouthernLINC Wireless, to the Hon. Julius Genachowski, Chairman, FCC, WT Docket No. 05-265, filed July 28, 2009.

exclusion.⁵³ Through the elimination of the home roaming exclusion, we seek to encourage parties to negotiate roaming agreements – based on reasonable terms and conditions – that fill in gaps in their network coverage, including in areas where they hold spectrum rights. Our expectation is that, with the revised rule adopted in this Order setting out an underlying obligation to provide automatic roaming, we have laid the foundation to enable carriers to successfully negotiate reasonable roaming arrangements, including requests for home roaming.

20. We stand ready, however, to the extent necessary, to resolve roaming disputes including whether a particular requesting carrier's request is reasonable, or whether a would-be host carrier has met its obligation to provide roaming on reasonable and not unreasonably discriminatory terms and conditions. This case-by-case analysis, through the dispute resolution process, will enable us to take into consideration the particular circumstances of each dispute as they are relevant to the Commission's goals to determine whether a particular automatic roaming request, and the would-be host carrier's response, are reasonable.

21. Initially, we find that the home roaming exclusion, as adopted, failed to achieve its stated purposes in a number of respects. In adopting the home roaming exclusion, the Commission sought to promote facilities-based competition by preserving appropriate incentives for carriers to construct facilities in areas where they have spectrum holdings.⁵⁴ The record highlights, however, that in certain circumstances the exclusion can hinder the development of such competition and create disincentives to construct. In particular, the home roaming exclusion as adopted unintentionally created confusion as to roaming rights and led some to conclude that a carrier effectively has no right to request roaming in any market where it held spectrum, and the would-be host carrier has no obligation to negotiate roaming arrangements. This would be the case even when that spectrum is newly licensed and the carrier seeking roaming thus has never had any opportunity to build any facilities in any part of the licensed spectrum. We find that the home roaming exclusion as adopted can in effect require carriers entering new markets to build out their networks extensively throughout the newly obtained license area before they can provide a competitive service to consumers, all without the benefit of financing the construction of new networks over time with revenues from existing services and reliance on roaming to fill in gaps during build out.⁵⁵ With "home market" defined under the exclusion on the basis of an entire license area (*e.g.*, CMA, BTA, EA, REAG), this buildout burden can be significant, and potentially can even cover several states (*e.g.*, if licensed on an REAG basis).⁵⁶ In such circumstances, we find that the exclusion can delay or deter entry into a market because a carrier seeking to provide service in a new geographic area, without the ability to supplement its networks with roaming and whose initial facilities would necessarily be limited, would be required to compete with incumbents that had been developing and expanding their networks for many

⁵³ See 2007 Report and Order, 22 FCC Rcd at 15834-35 ¶¶ 47-51.

⁵⁴ See 2007 Report and Order, 22 FCC Rcd at 15835 ¶ 49.

⁵⁵ RTG/OPASTCO Comments at 6-10. See also MetroPCS Petition for Reconsideration at 8 (noting small carriers and entrepreneurial carriers often do not have unlimited financial resources and must roll out service over time so that income generated in the initial service areas can be used to fund expansions). See also Leap Wireless Reply at 10 (providing an expert report from Dr. Simon Wilkie that concludes in part the home roaming exclusion will compound market failure in areas where competition is most at risk: rural, high cost, and hard-to reach areas, as well as areas where other regulations limit entry).

⁵⁶ Indeed, instead of promoting the entry of new entrants in a market, the home roaming exclusion might deter new entry given that that entrant might lose its ability to provide roaming coverage to its customers throughout any part of a licensed area in which it would be obtaining spectrum rights.

years. The Commission has previously recognized that this “head-start” advantage can constitute a significant hurdle to new competition.⁵⁷

22. In addition, although the exclusion was intended to incentivize carriers to use their spectrum holdings through additional buildout, it deprives them of roaming rights even in circumstances where their spectrum is not available or usable for reasons beyond their control. For example, a carrier’s AWS-1 spectrum holding might be unavailable because of the unfinished relocation of U.S. Government incumbent users from that band.⁵⁸ In other instances, an area may be subject to legal constraints that permit only one carrier to offer service (*e.g.*, in certain subway systems or government lands), notwithstanding the nominal coverage of the area by a license held by another carrier.

23. Another reason for eliminating the home roaming exclusion is that it does not adequately account for the fact that building another network may be economically infeasible or unrealistic in some geographic portions of licensed service areas. We find that, in some areas of the country with very low population densities, it is simply uneconomic for several carriers to build out. Further, we note that it may be significantly more costly to build out when the carrier only has access to higher spectrum frequencies where propagation characteristics are less advantageous.⁵⁹ Indeed, every carrier, including every nationwide carrier holding licenses that cover the entire country, relies on roaming to some extent to fill in gaps in its network coverage.⁶⁰ In particular, the record reflects that for many CMRS carriers, there are areas within their licensed service areas where there is insufficient demand to support construction in those areas by another carrier.⁶¹

24. To address these issues, some parties propose that the Commission retain some modified form of the home roaming exclusion.⁶² These proposals vary significantly in terms of the timing and scope of implementation, and whether in particular instances there should be exceptions to the exclusion. For instance, many suggest that implementation of the home roaming exclusion be delayed for some period following the effective date of the order.⁶³ Some advocate that the exclusion take effect in a particular location only after a period of time following the availability of spectrum to a new licensee – which may occur with the initial issuance of a license by the Commission or only after the license is no

⁵⁷ See, *e.g.*, *Resale First Report and Order*, 22 FCC Rcd 18455 18465-66 ¶¶ 17-18.

⁵⁸ See *e.g.*, Leap Wireless Petition for Reconsideration at 2; MetroPCS Petition for Reconsideration at 16; Spectrum Co. Petition for Reconsideration at 3-4, 10; and T-Mobile Petition for Reconsideration at 6.

⁵⁹ See T-Mobile Dec. 15, 2009 *Ex Parte* at 1; see also Sprint Nextel Dec. 17, 2009 *Ex Parte* at 1.

⁶⁰ See T-Mobile Petition for Reconsideration at 6; Letter from Maria L. Cattafesta, Senior Counsel, Government Affairs, Sprint Nextel, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Aug. 15, 2008 at 3.

⁶¹ See, *e.g.*, Letter from Sprint Nextel, FCC, WT Docket No. 05-265 filed Aug. 15, 2008 at 2-4. See also T-Mobile Reply at 3; Leap Wireless Petition for Reconsideration at 12; Leap Wireless Reply at 7-10; Leap Wireless Opposition at 10.

⁶² See, *e.g.*, Letter from M. Robert Sutherland, AT&T, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Aug. 8, 2008 at 1; Leap Wireless Petition for Reconsideration at 2; MetroPCS Petition for Reconsideration at 16; and Spectrum Co. Petition for Reconsideration at 3-4, 10.

⁶³ See, *e.g.*, Letter from Philip L. Verveer, Wilkie, Farr & Gallagher, on behalf of SpectrumCo. to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Aug. 8, 2008 at 1-2; Letter from Gigi Sohn, President, Public Knowledge on behalf of the Public Interest Spectrum Coalition to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Aug. 13, 2008; and Letter from James H. Barker, Leap Wireless International, Inc., to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Dec. 11, 2009, at 3-4.

longer encumbered for reasons beyond the requesting carrier's control.⁶⁴ The particular suggestions for the limited period of time range widely, between one year and seven years.⁶⁵ Other suggestions include the possibility that the exclusion not apply for an additional time period if a requesting carrier meets Commission-specified build-out benchmarks on a population or geographic coverage basis within specific time periods.⁶⁶ As another alternative, some suggest that, after an initial transition period during which home roaming would be provided, the home roaming exclusion would apply where the would-be host carrier affirmatively establishes that the requesting carrier has failed to make progress in building out.⁶⁷

⁶⁴ Letter from M. Robert Sutherland, AT&T, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Aug. 8, 2008 at 1 (proposing that home roaming rights should only apply in cases where the requesting carrier cannot build out because of encumbrances and should only extend for one year). *See also* Leap Wireless Petition for Reconsideration at 2; MetroPCS Petition for Reconsideration at 16; Spectrum Co. Petition for Reconsideration at 3-4, 10; T-Mobile Petition for Reconsideration at 6 n.11 (emphasizing the adverse impact that the Commission's decision to exclude home roaming may have on recent licensees of AWS-1 spectrum due to the need for AWS-1 spectrum clearing).

⁶⁵ *See, e.g.*, Letter from Philip L. Verveer, Wilkie, Farr & Gallagher, on behalf of SpectrumCo. to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Aug. 8, 2008 at 1-2 (requesting up to seven years from the effective date of the order); Letter from Gigi Sohn, President, Public Knowledge on behalf of the Public Interest Spectrum Coalition to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Aug. 13, 2008 (requesting a minimum number of years, such as five years); Letter from James H. Barker, Leap Wireless International, Inc., to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Dec. 11, 2009, at 3-4 (offering proposal with different time periods for different license areas). *See also* Letter from M. Robert Sutherland, AT&T, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Aug. 8, 2008 at 1 (proposing that home roaming rights should only apply in cases where the requesting carrier cannot build out because of encumbrances and should only extend for one year); Letter from Lowell C. McAdam on behalf of Verizon Wireless to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed July 23, 2009, attaching a letter dated July 22, 2009 from Lowell C. McAdam, President and Chief Executive Officer of Verizon Wireless, to the Honorable Henry A. Waxman, Chairman of the House Energy and Commerce Committee containing Verizon Wireless's proposal for modifying the Commission's existing rule governing automatic roaming (stating that it would support a statute or FCC rule that required a would-be host carrier to offer automatic roaming to a requesting carrier's subscribers in any area where the requesting carrier holds spectrum but does not offer service: (a) for a period of 2 years from the date the statute or rule takes effect; (b) after that period, if all of the spectrum usage rights held by the requesting carrier in the area is encumbered by U.S. Government users; or (c) after that period, if all of the spectrum usage rights held by the requesting carrier in the area was originally licensed by the FCC for CMRS purposes less than 2 years earlier; and (d) after that period, for an additional one year if the requesting carrier has met build-out benchmarks to be established by statute or the FCC).

⁶⁶ *See* Letter from James H. Barker, Latham & Watkins, LLP, on behalf of Leap Wireless, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed December 11, 2009 at 3 (Leap December 11, 2009 *Ex Parte*) (proposing a host carrier be obligated to continue to provide home roaming within a requesting carrier's home market only if the requesting carrier demonstrated signal coverage of at least forty (40) percent of the population of its licensed service area). Verizon Wireless states it would support a statute or FCC rule that required a would-be host carrier to offer automatic roaming to a requesting carrier's subscribers in any area where the requesting carrier holds spectrum but does not offer service for, among other things, a period of two years from the date the statute or rule takes effect and for an additional one year if the requesting carrier has met certain build-out benchmarks to be established by statute or the FCC. *See* Verizon Wireless July 23, 2009 *Ex Parte*, Attachment at 2.

⁶⁷ Letter from Carl W. Northrop, Paul, Hastings, Janofsky & Walker, LLP, on behalf of MetroPCS, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Dec. 8, 2009 at 1 (MetroPCS Dec. 8, 2009 *Ex Parte*). *See also* Letter from Gigi Sohn, President, Public Knowledge on behalf of the Public Interest Spectrum Coalition to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Aug. 13, 2008 (proposing that, after expiration of (continued....))

25. We conclude that the better, simpler approach is to eliminate the home roaming exclusion. We find the reasonableness of a roaming request in many instances will likely depend on the individual circumstances of a particular request. For instance, we recognize the difficulties in determining accurately whether a carrier has avoided facilities-based entry in a high cost area because it is prohibitively difficult or merely less profitable than urban areas. This difficulty, however, and the intensively fact-based nature of the issue, weighs in favor of a case-by-case, fact-driven approach that we are adopting for resolving disputes over roaming arrangements. We discuss below the various factors that will guide the resolution of any disputes brought before us.

26. We also note that, in the *2007 Report and Order*, the Commission continued to encourage all CMRS carriers to negotiate reasonable roaming agreements. It specifically contemplated that, even with the home roaming exclusion, CMRS carriers would continue voluntarily to negotiate automatic roaming agreements that included home roaming.⁶⁸ The record supports the conclusion that the Commission's home roaming exclusion is hampering CMRS carriers' abilities to negotiate automatic roaming agreements for home roaming or obtain renewal of existing automatic roaming agreements that included home roaming, and will likely have a growing impact in the future.⁶⁹ We find that the home roaming exclusion unintentionally changed the status quo with regard to carriers' previously existing practices in negotiating roaming agreements and may have disrupted settled expectations of competitive carriers on which they formed long-term business models.⁷⁰

27. In particular, we reject the arguments of AT&T and Verizon Wireless that carriers cannot claim any harm in the home roaming exclusion because it merely maintains a status quo under which they have never had any rights to home roaming.⁷¹ Although, prior to the *2007 Report and Order*, the (Continued from previous page) _____ the time period, the presumption should remain in favor of home roaming unless the would-be host carrier satisfies the burden of proving that withdrawing home roaming will not harm wireless consumers).

⁶⁸ Letter from Kathleen O'Brien Ham, Vice President Federal Regulatory Affairs, T-Mobile to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Aug. 7, 2008 at 2, 4; Sprint Nextel Petition for Reconsideration at 7-10.

⁶⁹ For example, although certain pre-*2007 Report and Order* agreements that grant home roaming rights remain in effect today, MetroPCS states that, in pursuing several roaming initiatives since the adoption of the home roaming exclusion, it has found it extremely difficult to negotiate acceptable new roaming arrangements for either voice or data roaming beyond those mandated by merger conditions, and that such difficulties have been "particularly acute" for home roaming and data roaming requests, with Nationwide carriers proposing exorbitantly high rates to the extent such roaming rights are offered at all. See Letter from Carl W. Northrop, Paul, Hastings, Janofsky & Walker, LLP, on behalf of MetroPCS, to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Jan. 6, 2010 (MetroPCS Jan. 6, 2010 *Ex Parte*) at 9, 11; see also Cricket *Ex Parte* letter from Robert J. Irving, Jr., Vice President and General Counsel, Leap Wireless and Cricket to Marlene Dortch, Secretary, FCC dated July 29, 2009 at 4 (noting that even before Verizon acquired its roaming partner ALLTEL, Verizon had begun to exert its market power by imposing in-market restrictions on roaming agreements). See MetroPCS Jan. 6, 2010 *Ex Parte* at 9, 11 (asserting that instances of refusal to provide home roaming will likely grow once existing roaming agreements and transaction-related obligations expire.).

⁷⁰ Letter from Kathleen O'Brien Ham, Vice President Federal Regulatory Affairs, T-Mobile to Marlene Dortch, Secretary, FCC, WT Docket No. 05-265, filed Aug. 7, 2008 at 2, 4; Sprint Nextel Petition for Reconsideration at 7-10.

⁷¹ See AT&T Opposition at 6-7 (arguing that home roaming exemption will deter new entrants is unavailing because "[n]either automatic roaming nor home roaming has ever been required."); Verizon Aug. 1, 2008 *Ex Parte*, at 4-5 ("the home roaming exception merely retains the status quo – wireless carriers have not been entitled to home roaming service since the inception of the cellular industry 25 years ago.").

Commission had not expressly provided that there was a home roaming obligation under Sections 201 and 202, nor adopted any rules requiring the provision of such services, it had stated on several occasions that carriers that were unreasonably denied automatic roaming could seek relief under Section 201. For example, when addressing in its 2000 Notice of Proposed Rulemaking whether to adopt an automatic roaming requirement, the Commission began by affirming that “roaming is a common carrier service . . . and thus . . . the provision of roaming is subject to the requirements of Section 201(b), 202(a), and 332(c)(1)(B) of the Communications Act.”⁷² It then sought comment on, among other things, whether “the avenues of complaint and redress afforded by Section 208 provide sufficient and appropriate means of ensuring the development of automatic roaming services in a competitive CMRS market.”⁷³ Similarly, in the *2005 Roaming Reexamination NPRM*, the Commission began a further consideration of whether to adopt an explicit automatic roaming requirement by stating that “complaints and enforcement actions involving unjust and unreasonable charges, practices, or discriminatory conduct by CMRS carriers in the provision of roaming services are covered by the complaint process set forth in Title II of the Act.”⁷⁴ During this period, the Commission also indicated in transactions-related orders that automatic roaming was subject to the statutory obligations under Section 208.⁷⁵

28. In referring to existing carrier obligations under Section 201 and 202, the Commission generally did not distinguish between home roaming and automatic roaming.⁷⁶ Further, during this period, automatic roaming arrangements were being negotiated among carriers, with no specific indication that home roaming agreements were particularly problematic.⁷⁷ Thus, we find that the clarifications in the *2007 Report and Order* did alter the legal status quo against which automatic roaming arrangements were being negotiated, and that the adoption of an automatic roaming obligation with a home roaming exclusion appears to have significantly reduced the incentive to make home roaming available, and will lead to a reduction in the availability of home roaming arrangements over time. Indeed, as discussed earlier, the record supports the conclusion that the Commission’s home roaming exclusion is hampering CMRS carriers’ abilities to negotiate automatic roaming agreements that include home roaming.⁷⁸

29. Other factors may be contributing to a declining availability of roaming arrangements in home markets, which further supports our action here. For one, since the Commission’s adoption of the home roaming exclusion, there have been a number of significant mergers consummated in the last two

⁷² Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services, WT Docket No. 00-193, 15 FCC Rcd 21628, 21634 ¶ 15 (*2000 Roaming NPRM*).

⁷³ *Id.* at 21638 ¶ 26.

⁷⁴ Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, 20 FCC Rcd 15047, 15048 ¶ 2 (2005) (*2005 Roaming Reexamination NPRM*).

⁷⁵ See, e.g., Cingular-AT&T Merger Order, 19 FCC Rcd 21522, 21592 ¶ 182 (“if a roaming partner believes that Cingular is charging unreasonable roaming rates, it can always file a complaint with the Commission under Section 208 of the Communications Act.”).

⁷⁶ The Commission did seek comment in its *2005 Roaming Reexamination NPRM* on whether an automatic roaming rule should include a requirement that a carrier enter into an automatic roaming arrangement with a facilities-based competitor in the same market (“in-market” roaming). 20 FCC Rcd at 15060 ¶ 35.

⁷⁷ See *2007 Report and Order*, 22 FCC Rcd at 15827 ¶ 24. The Commission did note evidence of problems in the roaming market generally in the *2007 Report and Order*. See *2007 Report and Order*, 22 FCC Rcd at 15828 ¶ 28.

⁷⁸ See *supra*, n. 69.

and a half years. MetroPCS states that, with the consolidation in the industry, the number of roaming partners is diminishing, making it less likely that leaving negotiations involving home roaming strictly to the market without any underlying regulatory obligations, will result in fewer such roaming agreements.⁷⁹ Additionally, T-Mobile provides an expert report with an economic analysis of roaming that recommends the elimination of the home roaming exclusion in light of the significant changes in the wireless industry since the *2007 Report and Order* was released.⁸⁰ AT&T points out that, with respect to each wireless transaction approved since 2007, the Commission has concluded that the transaction, with or without conditions, served the public interest and argues that the transactions have yielded significant consumer benefits in that AT&T brings to the customers of the acquired carrier access to the same wireless services and products, such as next-generation networks and innovative voice and data plans, that are available to customers in the most densely populated areas.⁸¹ While the Commission has approved these transactions, with conditions, as not resulting in any transaction-specific competitive harm, those orders have recognized the legitimacy of addressing roaming issues in a rulemaking context⁸² and we find that broad industry trends should be considered in evaluating the availability of reasonable home roaming arrangements. We find that, in some areas, the consolidation in the wireless industry may have reduced the number of available roaming partners for some of the smaller, regional and rural carriers.⁸³ This trend thus may have contributed to reductions in the availability of voluntary and reasonable roaming arrangements, including arrangements for home roaming. Regardless of the factors behind the apparent decline in the availability of such roaming arrangements, we find further grounds to reconsider an upfront, categorical home roaming exclusion that can serve as a bar to negotiation of reasonable arrangements.

30. We reject contentions by AT&T and Verizon Wireless that the Commission needs to retain the home roaming exclusion so as not to undermine facilities-based service or discourage competition

⁷⁹ See MetroPCS Reply at 4 n. 10.

⁸⁰ *T-Mobile Nov. 30, 2009 Ex Parte* at 3. See also White Paper entitled Economic Analysis of the Provision of Roaming Service in the Wireless Service Industry attached to the *Ex Parte* at 9-11 (stating that, in the last eight years, there have been important changes in the ownership structure in the wireless service markets, particularly with respect to several important regional network operators that have been acquired by other firms such as, for example, ALLTEL, Dobson, Edge and RCC in more recent years, and noting that the firms that own large shares of these previously-independent networks are now more in direct competition in the consumer market with providers looking to extend their coverage via roaming).

⁸¹ Letter from Michael Goggin, AT&T Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Dec. 22, 2009 at 4.

⁸² Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and *De Facto* Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act, WT Docket No. 08-95, *Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd 17444, 17525 ¶ 180 (2008); Sprint Nextel Corporation and Clearwire Corporation Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations, WT Docket No. 08-94, *Memorandum Opinion and Order*, 23 FCC Rcd 17570, 17606 ¶ 92 (2008); and Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements, WT Docket No. 08-246, *Memorandum Opinion and Order*, 24 FCC Rcd 13915, 13969 ¶ 133 (2009).

⁸³ See, e.g., Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements, WT Docket No. 08-246, *Memorandum Opinion and Order*, 24 FCC Rcd 13915, ¶ 130 (2009).

based on coverage and service quality.⁸⁴ According to AT&T, the home roaming exclusion has positive effects on competition and there is no justification for allowing a company to take advantage of its competitor's investment in network infrastructure and superior in-market coverage.⁸⁵ Verizon Wireless similarly argues the home roaming exclusion should be retained because it encourages build-out in high cost areas and serves the public interest by allowing carriers that have made the investment to construct facilities in high cost areas to differentiate themselves on the basis of superior coverage.⁸⁶ Verizon Wireless also states that repealing the home roaming exclusion would undermine the pro-competitive benefits that flow from carriers differentiating themselves on the basis of superior coverage in the home market, and would also undermine the requesting carriers' incentive to build network facilities to improve coverage in their licensed areas.⁸⁷

31. We agree that there are pro-competitive benefits that flow from carriers differentiating themselves on the basis of coverage in their licensed service areas, including in rural and remote areas.⁸⁸ However, we are not persuaded that replacing the current categorical home roaming exclusion with a case-by-case assessment of reasonableness, based on the reasonableness of a particular roaming request, will undermine these pro-competitive benefits. We seek here to balance various factors, which, in addition to fostering investment, include promoting competition, encouraging new entrants, and protecting the interests of consumers. We also consider that outcomes can have both positive and negative effects on the build-out incentives of both requesting and host carriers, and these considerations must also be weighed. In balancing these effects and factors, we find that adopting an approach that includes a general presumption of reasonableness with respect to automatic roaming, combined with a case-by-case determination of reasonableness in the event of a dispute, better preserves incentives to enter and incentives to invest overall, and at the same time protects consumers by facilitating their access to ubiquitous service.

32. AT&T argues that, if the first carrier providing coverage in a given area were required to provide automatic home roaming service to its competitors' customers, there would be no reason for competitors to build out their own networks in that area.⁸⁹ We disagree. Carriers deploying next generation networks will still have incentives to build out to ensure that their subscribers receive all of the benefits of the carriers' own advanced networks.⁹⁰ We find that, as a practical matter, the relatively high

⁸⁴ AT&T Opposition at 3-7, Verizon Wireless Opposition at 4-6.

⁸⁵ AT&T Opposition at 4.

⁸⁶ Verizon Wireless Opposition at 4.

⁸⁷ *Id.*, at 4-5.

⁸⁸ We note that incentives to construct in remote areas may not be exclusively based on revenues generated by traffic in those areas. Another potential incentive is the additional subscribership a carrier may obtain in areas of high population density as a result of being able to offer such subscribers coverage in the event they travel into remote areas of the country and require connectivity. To the extent that a carrier is obligated to make its coverage available to its competitors, however, that benefit of construction would be reduced.

⁸⁹ AT&T Opposition at 5.

⁹⁰ SpectrumCo Petition for Reconsideration at 12-13 and Reply at 4. (also noting that with roaming rates being much higher than retail rates, a smaller carrier cannot expect to compete when its subscribers are roaming all the time or even a large percentage of the time). *See also* MetroPCS Petition for Reconsideration at 12 noting it is simply not economically feasible or sound business practice for any carrier to pursue a strategy based on roaming at the expense of building its own network.

price of roaming compared to providing facilities-based service will often be sufficient to counterbalance the incentive to “piggy back” on another carrier’s network.⁹¹ Further, we emphasize that host carriers have flexibility, subject to a standard of reasonableness, to establish the structure and the level of roaming rates, and that, as described below, the fact that a requesting carrier holds spectrum, or is offering service on its own facilities, in an area are among the factors we may consider in addressing disputes.⁹² Accordingly, the impact of a roaming obligation on buildout incentives does not warrant a general exclusion, but should be considered as a factor on a case-by-case basis in the event of a dispute.⁹³

33. We reject as well AT&T’s argument that there is no evidence to suggest that home roaming is necessary to eliminate the “head start” advantage of larger carriers.⁹⁴ As discussed above, we find that the record amply supports a finding that in the absence of roaming arrangements, such an advantage will deter investment and constitute a significant hurdle to competition.⁹⁵

34. AT&T also argues that no regulatory intervention is necessary because there is competition in the retail market and no harm to consumers.⁹⁶ We note that in the *2007 Report and Order*, the Commission already rejected this argument when it found that automatic roaming is a common carrier service and adopted the automatic roaming rule, concluding that “[g]iven the current CMRS market situation and wireless customer expectations, [i]t is in the public interest to facilitate reasonable roaming requests by carriers on behalf of wireless customers.”⁹⁷ As noted in the *2007 Report and Order*,

⁹¹ Spectrum Co Petition for Reconsideration at 12 (stating that there are significant incentives for carriers to choose to deploy their own network rather than piggyback on other networks, including investment incentives in achieving one’s own superior network and ensuring subscribers receive the benefits of a more advanced network).

⁹² See ¶ 39 *infra*. See also *2007 Report and Order*, 22 FCC Rcd at 15831-33 ¶¶ 36-40.

⁹³ See T-Mobile Petition for Reconsideration at 1-2, 8-9; *T-Mobile Nov. 30, 2009 Ex Parte* at 4 n.15.

⁹⁴ AT&T Opposition at 7. Moreover, AT&T states that a home roaming requirement would interfere with market forces by altering the way inter-carrier business arrangements are established, allowing a carrier that has made fewer investments and has a smaller coverage area to be entitled to have its customers roam on the network of a competitor that has made greater investments to produce superior coverage. AT&T Opposition at 9.

⁹⁵ See Spectrum Co Petition for Reconsideration at 3-10 (arguing not imposing home roaming obligations harms consumer interests by deterring new competitive entry); RTG/OPASTCO Comments at 9; MetroPCS Petition for Reconsideration at 8 (stating that building a competitive system as a new entrant can be time consuming due to the increasing difficulty of finding suitable sites and obtaining all of the local, state, and federal regulatory approvals necessary to put the sites to use); U.S. Cellular Comments at 4 (noting that it is generally far more difficult than it was decades ago to construct wireless base stations, owing to increased regulatory scrutiny from all levels of government and increased opposition to wireless towers by some members of the public); SpectrumCo Petition for Reconsideration at 1-3; T-Mobile Petition for Reconsideration at 5-6 (cautioning that the exclusion will discourage new entry into the wireless market and hamper rather than promote facilities-based competition). See also Leap Wireless Petition for Reconsideration at 12-14, 16-18; MetroPCS Petition for Reconsideration at 23; T-Mobile Petition for Reconsideration at 7-8 (stating that the home market exclusion benefits larger carriers because they are more likely to be incumbents in those markets and the larger incumbent carriers will deny access to their networks in an effort to hamper new entrants’ ability to compete in the same markets).

⁹⁶ AT&T Dec. 22, 2009 *Ex Parte* at 8.

⁹⁷ See *2007 Report and Order*, 22 FCC Rcd at 15828 ¶ 28. See also *2007 Report and Order*, 22 FCC Rcd at 15826 ¶ 23 (finding that the automatic roaming is a common carrier service, and carriers must provide automatic roaming service upon receiving a reasonable request). Although the Commission adopted automatic roaming rules, it declined to regulate automatic roaming rates, finding that consumers would be protected from being harmed by the level and structure of roaming rates negotiated between carriers given that the rates individual carriers pay for (continued....)

consumers increasingly rely on mobile services, they reasonably expect to continue their wireless communications wherever they are, and automatic roaming benefits them by promoting seamless CMRS service around the country.⁹⁸ In this order, we merely place requests for the home roaming under the same framework as other requests for roaming services. As discussed above, our decision here will protect consumers, promote competition, ensure that consumers have access to seamless coverage nationwide, and provide incentives for all carriers to invest and innovate by using available spectrum and constructing wireless network facilities on a widespread basis.

35. We also disagree with AT&T's contention that elimination of the home roaming exclusion would create *de facto* mandatory resale obligations.⁹⁹ The automatic roaming obligation imposed in the 2007 Roaming Order under Sections 201 and 202, and that we expand here with the elimination of the home roaming exclusion, is not intended to resurrect CMRS resale obligations. The Commission's mandatory resale rule was sunset in 2002,¹⁰⁰ and, as the Commission previously stated, the automatic roaming obligations cannot be used as a backdoor way to create *de facto* mandatory resale or virtual reseller networks.¹⁰¹ We find that our actions herein in eliminating the home roaming exclusion will not effectively change the Commission's policy on CMRS resale obligations. While resale obligations are intended to offer carriers the opportunity to market a competitive retail service without facilities development, such a resale product would not serve our goals of promoting facilities-based competition, the development of spectrum resources, and the availability of ubiquitous coverage.¹⁰²

36. *Addressing disputes.* To the extent there is a disagreement between CMRS carriers regarding automatic roaming requests, including requests for home roaming rights, carriers may seek a determination from the Commission as to whether the parties have met their obligations with regard to automatic roaming. We reaffirm here our intent to address such roaming disputes expeditiously.¹⁰³ Whether or not the appropriate procedural vehicle is a complaint under Section 208 of the Act or a petition for declaratory ruling under Section 1.2 of the Commission's rules may vary depending on the circumstances of each case.¹⁰⁴ If a dispute arises regarding automatic roaming obligations, parties are encouraged to contact Commission staff for procedural guidance and for negotiations using the Commission's informal dispute resolution processes. Below, we provide some clarification as to how such disputes will be addressed.

37. We first emphasize that CMRS carriers' statutory obligations regarding automatic roaming are not framed in absolute terms. Under Sections 332(c)(1)(B), 201 and 202, the request to obtain

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automatic roaming services will be determined in the marketplace through negotiations between the carriers, subject to the statutory requirement that any rates charged be reasonable. See 2007 Report and Order, 22 FCC Rcd at 15832-33 ¶¶ 37-40.

⁹⁸ See 2007 Report and Order, 22 FCC Rcd at 15828 ¶ 28.

⁹⁹ AT&T Opposition at 7.

¹⁰⁰ The CMRS Resale Rule expired at the close of November 24, 2002 pursuant to the sunset provision of the rule. 47 C.F.R. § 20.12(b) (1998).

¹⁰¹ See 2007 Report and Order, 22 FCC Rcd at 15836 ¶ 51; see also 47 C.F.R. § 20.12.

¹⁰² See US Cellular Comments at 6 (stating that "resellers and carriers pursuing a roaming model have generally not succeeded in the wireless marketplace").

¹⁰³ See 2007 Report and Order, 22 FCC Rcd at 15830 ¶ 30.

¹⁰⁴ See 47 U.S.C. § 208; 47 C.F.R. § 1.2.

automatic roaming must be “reasonable.”¹⁰⁵ Furthermore, Section 201(b) requires carriers’ practices relating to their provision of automatic roaming to be “reasonable” and Section 202(a) prohibits “unjust and unreasonable” discrimination.¹⁰⁶ Thus, in each instance, the statutory obligation is qualified by a “reasonableness” standard. The Commission has broad discretion in interpreting these statutory obligations and the application of the “reasonableness” standard to a particular context.¹⁰⁷ As discussed below, in resolving roaming disputes, we will assess whether a request is reasonable and whether the host carrier’s response to the request is reasonable and not unreasonably discriminatory based on the totality of the circumstances of a particular case.¹⁰⁸

38. In resolving disputes, we will presume, in the first instance, that a request for automatic roaming of covered services by a technologically compatible carrier is reasonable under Sections 332(c), 201 and 202, regardless of whether the request includes areas where the requesting carrier holds spectrum rights.¹⁰⁹ When a presumptively reasonable automatic roaming request is made, a would-be host CMRS carrier has a duty to respond promptly to the request and avoid actions that unduly delay or stonewall the course of negotiations regarding that request.¹¹⁰ For example, following receipt of a presumptively reasonable automatic roaming request, evidence of a would-be host carrier’s refusal to respond at all or a persistent pattern of stonewalling behavior will likely support a finding of a breach of the would-be host carrier’s automatic roaming obligations.¹¹¹

39. As discussed above, we seek to encourage parties to negotiate roaming agreements based on reasonable terms and conditions. In case of a dispute, our consideration begins with the presumption that a request by a technologically compatible carrier for automatic roaming is reasonable. This presumption of reasonableness, however, is rebuttable, and host carriers may seek to demonstrate, under their particular circumstances, that the general presumption of reasonableness with respect to the provision of automatic roaming requests meeting the conditions specified above should not apply. Below, we provide additional guidance on factors the Commission may consider when resolving such roaming disputes that are brought before it -- specifically in determining whether a request is reasonable and whether the host carrier’s response to the request is reasonable and not unreasonably discriminatory. Each case will be decided based on the totality of the circumstances, such that no particular factor will be dispositive. With that in mind, we clarify that the Commission may consider the following factors, as well as others, when considering whether requiring roaming in the circumstances at issue would best further our public interest goals:

¹⁰⁵ 47 U.S.C. § 332(c)(1)(B); 47 U.S.C. §§ 201 and 202. *See also 2007 Report and Order*, 22 FCC Rcd at 15831 ¶¶ 33-35 (describing reasonable requests for purposes of the automatic roaming obligation).

¹⁰⁶ 47 U.S.C. §§ 201(b), 202(a); *see AT&T Opposition* at 10.

¹⁰⁷ *See Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003) (“With respect to the Commission’s interpretation of [Section] 202 as applied to CMRS, the ‘generality of these terms’ -- unjust, unreasonable -- ‘opens a rather large area for the free play of agency discretion, limited of course by the familiar ‘arbitrary’ and ‘capricious’ standard in the Administrative Procedure Act.’”) (*citations omitted*).

¹⁰⁸ *See 2007 Report and Order*, 22 FCC Rcd at 15829-30 ¶ 30.

¹⁰⁹ *2007 Report and Order*, 22 FCC Rcd at 15831 ¶ 33.

¹¹⁰ *2007 Report and Order*, 22 FCC Rcd at 15831 ¶ 33.

¹¹¹ *Id.* We note that nothing in this order is intended to be construed by a host carrier as a basis to disrupt existing roaming arrangements based on any change-of-law provision in those arrangements.

- the terms and conditions of the proposed roaming agreement;
- the level of competitive harm in a given market and the benefits to consumers;
- the extent and nature of the requesting carrier's build-out in the areas where it holds spectrum rights and has requested automatic roaming, the length of time the requesting carrier has held such spectrum rights, whether such spectrum is encumbered, and if not, how long it has been unencumbered;
- significant economic factors, such as whether building another network in the geographic area may be economically infeasible or unrealistic,¹¹² and the impact of any "head-start" advantages¹¹³;
- whether the requesting carrier is seeking roaming for an area where it is already providing facilities-based service;
- the impact of granting the request on the incentives for either carrier to invest in facilities and coverage, services, and service quality;
- whether the carriers involved have had previous roaming arrangements with similar terms;
- whether alternative roaming partners are available;
- events or circumstances beyond either carrier's control that impact either the provision of automatic roaming or the need for roaming in the proposed area(s) of coverage;
- the propagation characteristics of the spectrum licensed to the requesting and would-be host carriers, including circumstances where the requesting carrier's spectrum rights in an area are limited to higher spectrum frequencies where propagation characteristics are less advantageous than a host carrier's licensed spectrum;
- other special or extenuating circumstances.

40. We note again that these factors are not exclusive or exhaustive. Carriers may argue that the Commission should consider other relevant factors in determining whether a request is reasonable or a host carrier's position is unreasonable or unreasonably discriminatory under Sections 201 and 202 of the Act. In addition, to better promote reasonable negotiations on both sides of a request, we clarify that, in determining whether a carrier will be found liable for a violation of its obligations under Sections 201 and 202, we will also consider whether its position had a reasonable basis, taking into account all relevant precedents and decisions by the Commission.¹¹⁴

B. Push-to-Talk

41. Based on the record, we find Sprint Nextel has failed to demonstrate sufficient grounds for revisiting the determination that carriers must provide roaming for push-to-talk services upon reasonable request. Accordingly, we deny Sprint Nextel's Petition for Reconsideration.

¹¹² See *supra* ¶ 23

¹¹³ See *supra* ¶¶ 21, 33.

¹¹⁴ See 47 U.S.C. §§ 207, 208.

1. Background

42. In the *2007 Report and Order*, the Commission found the services covered by the automatic roaming obligation under sections 201 and 202 are primarily limited to services offered by CMRS carriers that are real-time, two-way switched voice or data services, are interconnected with the public switched network, and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls.¹¹⁵ The Commission found, however, based on several factors, that it would serve the public interest to extend the scope of the automatic roaming obligation to push-to-talk service and SMS.¹¹⁶ First, the Commission noted such offerings were typically bundled as a feature on the handset with other CMRS services, including real-time, two-way switched mobile voice or data, that are interconnected with the public switched network.¹¹⁷ The Commission also observed push-to-talk and SMS, although sometimes implemented as non-interconnected features, were also implemented by some carriers as interconnected features.¹¹⁸ Finally, the Commission found consumers considered push-to-talk and SMS as features that are typically offered as adjuncts to basic voice services, and consumers expected the same seamless connectivity with respect to those features when traveling outside their home network service area.¹¹⁹

43. In its Petition for Reconsideration, Sprint Nextel argues the Commission's decision to impose roaming obligations on push-to-talk service is arbitrary and capricious, and unsupported by the record evidence.¹²⁰ Sprint Nextel further contends the decision is not generally applicable to the industry, but rather addresses a specific dispute between two parties, Sprint Nextel and SouthernLINC Wireless (SouthernLINC) and therefore "is effectively a bill of attainder requiring Sprint Nextel to assist its principal push-to-talk competitor."¹²¹ Sprint Nextel asserts the Commission erred in concluding that push-to-talk is sometimes an interconnected service.¹²² Sprint Nextel concedes push-to-talk is typically bundled as a feature on the handset with other CMRS services that are interconnected to the public switched network, but states that "the *Order* never explains the relevance of this bundling point to intercarrier roaming."¹²³ Further, Sprint Nextel disputes the push-to-talk feature on the handset is an "adjunct to basic voice services" because, as it argues, push-to-talk does not meet the legal criteria for a service "adjunct" to basic voice service.¹²⁴

¹¹⁵ *2007 Report and Order*, 22 FCC Rcd at 15837 ¶ 54; 47 C.F.R. § 20.12(a)(2).

¹¹⁶ *2007 Report and Order*, 22 FCC Rcd at 15837 ¶ 54.

¹¹⁷ *Id.* at 15837 ¶ 55.

¹¹⁸ *Id.* at 15837 ¶ 55.

¹¹⁹ *Id.*

¹²⁰ Sprint Nextel Petition for Reconsideration at 1-8.

¹²¹ *Id.* (arguing that no other push-to-talk system is a close substitute for its iDEN push-to-talk system; therefore, the roaming order is not generally applicable to the industry).

¹²² *Id.*

¹²³ *Id.* at 2.

¹²⁴ *Id.* at 4. Sprint Nextel also argues SouthernLINC's ability to "succeed in the marketplace" belies the Commission's conclusion that "consumers . . . expect the same seamless [roaming] connectivity . . . as they travel outside their home network service areas." *Id.* at 4-5, citing *2007 Report and Order*, 22 FCC Rcd at 15837 ¶ 55. (continued...)

44. SouthernLINC opposes Sprint Nextel's petition, stating that substantial record evidence and the agency's cumulative experience and expertise support the Commission's conclusion that it is in the public interest to extend an automatic roaming obligation to push-to-talk.¹²⁵ SouthernLINC notes the Commission had already developed an extensive record on push-to-talk in many prior proceedings which also supports the Commission's conclusions with respect to push-to-talk in the *2007 Report and Order*, including previous Commission proceedings on CMRS roaming and resale, the Commission's analysis of several significant mergers between CMRS carriers (including two involving Petitioner Sprint Nextel), and the Commission's own reports.¹²⁶ Further, SouthernLINC disputes Sprint Nextel's claim that no push-to-talk service is interconnected on the basis of both record evidence in the roaming proceeding and publicly available information. First, SouthernLINC points to the *Sprint Nextel Order* (cited in the *2007 Report and Order*) where the Commission noted several times that push-to-talk is offered both as an interconnected and non-interconnected service.¹²⁷ SouthernLINC also notes the Kodiak Network push-to-talk system¹²⁸ uses a voice circuit and has functionalities capable of providing interconnected telephony services such as conference calling and call waiting.¹²⁹ SouthernLINC asserts the Kodiak system has been adopted by both AT&T and Alltel and, therefore, "two of the nation's five largest carriers are interconnected PTT services."¹³⁰ Thus, in SouthernLINC's view, the Commission's conclusion that push-to-talk is an interconnected as well as a non-interconnected service was not erroneous and was supported

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Further, Sprint Nextel argues there has been no market failure or harm to consumers that would justify imposing a push-to-talk roaming obligation. *Id.* at 6-7.

¹²⁵ SouthernLINC Opposition at 1, 3.

¹²⁶ SouthernLINC Opposition at 3-4 & n. 6-8, *citing*, among other things, Applications of Nextel Communications, Inc. and Sprint Corporation, WT Docket No. 05-63, *Memorandum Opinion and Order*, 20 FCC Rcd 13967, 14012-13 ¶ 127 (2005) (*Sprint Nextel Order*); Applications of Nextel Partners, Inc., Transferor, and Nextel WIP Corp. and Sprint Nextel Corporation, Transferees, for Consent to Transfer Control of Licenses and Authorizations, File Nos. 0002444650, 0002444656, 0002456809, *Memorandum Opinion and Order*, 21 FCC Rcd 7358 (2006) (*Sprint Nextel Nextel Partners Order*); Applications of Western Wireless Corporation and ALLTEL Corporation, WT Docket No. 05-50, *Memorandum Opinion and Order*, 20 FCC Rcd 13053, 13093 ¶ 109 (2005) (*ALLTEL-WWC Order*); and Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, WT Docket No. 04-70, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21588 ¶ 172 (2004) (*Cingular-AT&T Wireless Order*). These proceedings are among the sources cited in the *2007 Report and Order* at n. 30-32.

¹²⁷ SouthernLINC Opposition at 8-9 & n. 8, *citing* the *Sprint Nextel Order*, 20 FCC Rcd at 13987-89 ¶¶ 46-50, *cited* in the *2007 Report and Order*, 22 FCC Rcd at 15837 ¶ 54, n. 133. Specifically, SouthernLINC noted that, the *2007 Report and Order's* discussion of PTT cites to, among other things, the *2005 Sprint/Nextel Merger Order*, in which the Commission stated that "PTT generally is bundled as a feature with other services such as mobile voice and mobile data on the handset and is usually available through the public switched network." Southern LINC Opposition at 8-9, *citing* *Sprint/Nextel Merger Order*, 20 FCC Rcd at 13987-88. Southern LINC further states that, in the same paragraph from the *2005 Sprint/Nextel Merger Order*, the Commission then noted, "[d]ispatch [as opposed to PTT] differs from mobile voice communications because it is generally not interconnected with the public switched telephone network (PSTN)". *Id.* Southern LINC notes that in its Petition, Sprint Nextel misquotes this passage, giving the impression that the Commission was describing all PIT services, rather than dispatch services. *Id.* at 9 n. 23.

¹²⁸ See < http://www.telecommagazine.com/newsglobe/article.asp?HH_ID=AR_4115 > (last visited July 24, 2008) (for a discussion of Kodiak Network clientless push-to-talk system and the roll-out by MetroPCS).

¹²⁹ SouthernLINC Opposition at 10.

¹³⁰ *Id.*

by the factual record. Similarly, SouthernLINC agrees with the Commission that push-to-talk is a feature generally bundled on the handset with voice telephony and that this is important to the analysis of consumer expectations.¹³¹ Leap Wireless also opposes Sprint Nextel's petition, arguing that push-to-talk services are often sold together with voice services. As a result, Leap states, consumers now expect that these services will be packaged together and that they will all work seamlessly.¹³²

2. Discussion

45. Having reviewed the arguments of all parties and the relevant record evidence, we find Sprint Nextel has failed to demonstrate sufficient grounds for revisiting the determination that carriers must provide push-to-talk roaming upon reasonable request.

46. First, we disagree with Sprint-Nextel that the Commission's findings on push-to-talk service were unsupported by record evidence.¹³³ Contrary to Sprint-Nextel's assertion, the record provides substantial evidence for the Commission's finding that push-to-talk is provided both as an interconnected service or feature and as a non-interconnected service or feature, depending on the technology and network configuration that is chosen by the carrier.¹³⁴ Consumers do not generally differentiate between push-to-talk that is interconnected and push-to-talk that is not interconnected, but form their expectations of seamless connectivity based on the way that push-to-talk service is provided on their cell phones and in their calling plans. As we noted in the *2007 Report and Order*, we find it in the public interest to protect and promote consumer expectations of seamless connectivity by extending automatic roaming obligations to push-to-talk. In that regard, the conclusion that consumers generally regard push-to-talk services as a feature on their handset, provided along with other CMRS services, is supported by the *Eleventh Competition Report*,¹³⁵ as well as by other publicly available information about the state of the push-to-

¹³¹ SouthernLINC Opposition at 6. Indeed, Southern LINC notes that the fact that a service or feature is typically bundled on the same handset with an interconnected service (such as voice telephony) means that consumers will generally expect to receive the same seamless mobility for that service or feature as they do for voice - a fact explicitly recognized by the Commission in the 2007 Roaming Order. *Id.*

¹³² Leap Wireless Comments at 2-3.

¹³³ See, e.g., *2007 Report and Order*, 22 FCC Rcd at 15836 ¶ 52-53 (summarizing background and comments on push-to-talk roaming and citing *Roaming NPRM*, 20 FCC Rcd at 15060-61). In the *Roaming NPRM*, the Commission sought industry-wide comment on push-to-talk, including further information on how widespread in the industry were the practices and problems complained of by SouthernLINC, 20 FCC Rcd at 15060-61.

¹³⁴ See *2007 Report and Order*, 22 FCC Rcd at 15837 ¶ 54 n. 133, citing 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, WT Docket No. 06-17, *Eleventh Report*, 21 FCC Rcd 10947, 10973 (2006) (*Eleventh Competition Report*); *Sprint Nextel Order*, 20 FCC Rcd at 13987-89 ¶ 46 (“[Push-to-talk] . . . is usually available through the public switched telephone network.”), ¶¶ 47-50. See also SouthernLINC Opposition at 10 (discussing Kodiak Networks' interconnected push-to-talk application and AT&T's use of Kodiak Network's application). For further information on Kodiak Networks' push-to-talk and related applications, see <<http://www.kodiaknetworks.com/portfolio/applications.html>> (last visited November 5, 2009).

¹³⁵ See *Eleventh Competition Report* at 10973-74 ¶ 64 (“[m]any cellular and broadband PCS carriers have begun to offer push-to-talk functionality on their networks, including Verizon Wireless, Cingular, Sprint Nextel (on its CDMA network), and Alltel”). See also 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, WT Docket No. 08-27, *Thirteenth Report*, DA 09-54 (rel. Jan. 16, 2009) (*Thirteenth CMRS Competition Report*), at ¶ 72.

talk market¹³⁶ and by commenters.¹³⁷ We likewise find substantial evidence that push-to-talk is typically not offered as a stand-alone voice service, but is offered solely in conjunction with the activation of basic voice service that is an interconnected service.¹³⁸ We find it likely consumers consider push-to-talk as a feature on their handsets that provides a different type of voice functionality that complements their basic voice service.¹³⁹ Sprint Nextel has not provided any factual evidence to demonstrate that this analysis is incorrect.

47. We also are not persuaded by Sprint Nextel's other arguments. Sprint Nextel disputes whether push-to-talk is in fact an "adjunct" to basic voice service as that term is used in the Commission's regulatory scheme.¹⁴⁰ The analysis in the *2007 Report and Order*, however, did not reference the particular regulatory construct cited by Sprint Nextel. Rather, as discussed above, the Commission used the term in a more general sense to describe the expectations of consumers based on their perception of push-to-talk services as provided in the marketplace.¹⁴¹ As the Commission stated: "[w]e are also aware that consumers consider push-to-talk and SMS as features that are typically offered as adjuncts to basic voice services, and expect the same seamless connectivity with respect to these features and capabilities as they travel outside their home network service areas (emphasis added)."¹⁴² We note that "safeguard[ing] wireless consumers' reasonable expectations of receiving seamless nationwide commercial mobile telephony services through roaming" is one of the goals that the Commission considered in establishing the parameters of the automatic roaming obligation.¹⁴³ Further, considering

¹³⁶ Push-to-talk is marketed to carriers as a feature that will be highly attractive to consumers when bundled with other features. See, e.g., Motorola Push to Talk over Cellular (PoC): Market Growth at the Push of a Button, (February, 2006) accessed at <<http://www.motorola.com/networkoperators/pdfs/PoC-WhitePaper.pdf>> (last visited August 1, 2008).

¹³⁷ A survey of major carriers' web sites demonstrates that handsets for consumers overwhelmingly provide push-to-talk as a feature on a mobile handset, not as a stand-alone radio service on a dedicated device. See also *Sprint Nextel Order*, 20 FCC Rcd at 13987 ¶ 46.

¹³⁸ For example, push-to-talk is generally not advertised as a stand-alone service. Sprint Nextel provides push-to-talk as a free service along with any Sprint Nextel voice activation. The Sprint Nextel web site lists a number of direct connect plans, but none of them appears on its face to be a stand alone plan. <<http://www.nextel.com/en/services/walkietalkie/overview.shtml>> (last visited Nov. 23, 2009). AT&T does not offer push-to-talk as a stand-alone service, but as a \$ 5 add-on to AT&T's mobile service. <<http://www.wireless.att.com/learn/ptt/>> (last visited Nov. 23, 2009). ALLTEL offers its push-to-talk service (Touch2Talk) only as an add-on to its wireless planes. <<http://www.alltel.com/>> (last visited Nov. 23, 2009). Verizon Wireless markets its push-to-talk service as a \$5 add-on feature. <<http://solutions.vzwshop.com/ptt/>> (last visited Nov. 23, 2009). In contrast, while non-interconnected data services are also offered bundled with voice services, we find that carriers also frequently offer such services on a stand-alone basis, particularly with regard to broadband data. See, e.g., <<http://nextelonline.nextel.com/NASApp/onlinestore/en/Action/DisplayPlans>> (describing Sprint Nextel's mobile broadband data service plans) (last visited Nov. 23, 2009).

¹³⁹ *2007 Report and Order*, 22 FCC Rcd at 15837 ¶ 55.

¹⁴⁰ See Sprint Petition for Reconsideration at 4.

¹⁴¹ The thesaurus provides "addition" and "accessory" as synonyms for "adjunct" which captures the usual market practice of providing push-to-talk as an add-on feature to a basic voice plan. See <<http://thesaurus.reference.com/browse/adjunct>> (last visited October 8, 2009).

¹⁴² *2007 Report and Order*, 22 FCC Rcd at 15837 ¶ 55 (emphasis added).

¹⁴³ See *2007 Report and Order*, 22 FCC Rcd at 15819 ¶ 3.

these factors taken together with the significant market presence of interconnected push-to-talk, which provides the same service functionality and will indisputably be subject to automatic roaming requirements, we again find it in the public interest that CMRS providers of push-to-talk voice services should be subject to the same automatic roaming obligations regardless of the technology or network configuration through which such services are provided.¹⁴⁴

48. Sprint Nextel's argument that this decision improperly adjudicates its dispute with SouthernLINC is also without merit. Specifically, the Commission declared its intention to proceed through rulemaking in two prior merger proceedings in which Sprint Nextel was a party.¹⁴⁵ Moreover, push-to-talk is not a service unique to Sprint Nextel. Other nationwide carriers are providing push-to-talk, and all push-to-talk features and capabilities are covered in the *2007 Report and Order* regardless of whether the underlying network is iDEN, CDMA, or GSM.¹⁴⁶ In determining whether extending roaming obligations to push-to-talk would serve the public interest, the Commission examined, among other things, the record evidence concerning Sprint Nextel's actions regarding push-to-talk roaming. SouthernLINC and other small iDEN carriers presented evidence that certain customers were unable to obtain seamless push-to-talk connectivity when outside their home market areas in the absence of a roaming agreement with Sprint Nextel.¹⁴⁷ That evidence is a relevant part of the overall record respecting "current market conditions" and "developments in technology" the Commission considered in making its determination whether push-to-talk services should be included in the roaming obligations imposed by the order.

¹⁴⁴ Cf. *2007 Report and Order*, 22 FCC Rcd at 15829 ¶ 29 (scope of automatic roaming obligation will "ensure[] that all CMRS providers competing in the mass market for real-time, two-way voice and data services are similarly obligated to provide automatic roaming services thereby equally benefiting all subscribers of mobile telephony services who seek to roam seamlessly over CMRS networks.").

¹⁴⁵ See Applications of Nextel Communications, Inc. and Sprint Corporation, WT Docket No. 05-63, *Memorandum Opinion and Order*, 20 FCC Rcd 13967, 14012-13 ¶ 127 (2005) (*Sprint Nextel Order*) (denying SouthernLINC's request that approval of the transaction be conditioned on the requirement that Sprint Nextel provide automatic roaming for iDEN voice, digital dispatch and data services at reasonable/non-discriminatory rates and terms; stating that the matters raised would be considered in a general rulemaking). See also Applications of Nextel Partners, Inc., Transferor, and Nextel WIP Corp. and Sprint Nextel Corporation, Transferees, for Consent to Transfer Control of Licenses and Authorizations, File Nos. 0002444650, 0002444656, 0002456809, *Memorandum Opinion and Order*, 21 FCC Rcd 7358 (2006) (*Nextel Partners Order*) (same). While Sprint Nextel now disputes the propriety of resolving this issue in a rulemaking, we note that, in the context of a merger application proceeding, it argued that SouthernLINC's requests for roaming rights *should be* "addressed in a rulemaking proceeding," *Sprint Nextel Order*, 20 FCC Rcd at 14012 ¶ 125, a position with which the Commission agreed. *Id.* at 14013 ¶ 128. See also Applications of Nextel Communications, Inc., Transferor, and Sprint Corporation, Transferee, for Consent to the Transfer of Control of Entities Holding Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act, WT Docket No. 05-63, Joint Opposition to Petitions to Deny and Reply to Comments (filed Apr. 11, 2005); at 8-9.

¹⁴⁶ *Eleventh Competition Report*, 21 FCC Rcd 10947, ¶ 64. See <[http://www.thefreelibrary.com/The+push-to-talk+\(r\)evolution%3a+carriers+are+rushing+to+implement+this...-a0113418002](http://www.thefreelibrary.com/The+push-to-talk+(r)evolution%3a+carriers+are+rushing+to+implement+this...-a0113418002)> (last visited Sept. 22, 2009) for a brief discussion of some of the available push-to-talk systems. Contrary to Sprint Nextel's assertion that other push-to-talk systems are not close substitutes for its push-to-talk, other commercially available systems are competing with the Sprint Nextel iDEN system. See, e.g., <http://www.allbusiness.com/business_planning/business_structures/3603343-1.html> (last visited Sept. 22, 2009).

¹⁴⁷ See, e.g., SouthernLINC Opposition at 15. See also *2007 Report and Order*, 22 FCC Rcd at 15828 ¶ 28 & n. 32.