

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

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

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

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MetroPCS Communications, Inc. (“MetroPCS”),¹ by its attorneys, hereby respectfully submits its reply comments on the *Second Further Notice of Proposed Rulemaking* (“*Second FNPRM*”) released by the Federal Communications Commission (the “FCC” or “Commission”) in the above-captioned proceeding.² MetroPCS supports a requirement that all wireless licensees offering broadband wireless data services³ be obligated to provide automatic broadband data roaming, under reasonable terms, rates and conditions, as a common carrier service under Title II

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

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

³ MetroPCS uses the term “broadband wireless data roaming services” to include all forms of non-interconnected wireless data services – including not only those that fit the Commission’s definition of “broadband data,” but also data services, such as 1xRTT.

of the Communications Act of 1934, as amended (the “Act”).⁴ The following is respectfully shown in support thereof:

I. INTRODUCTION AND SUMMARY

In the *Second FNPRM* the Commission sought comment on whether the automatic roaming rights of wireless carriers, set forth in the *In-Market Roaming Order*,⁵ should be extended to broadband data services.⁶ The vast majority of the wireless industry (along with numerous public interest groups) agree with MetroPCS that existing automatic roaming rights should extend to broadband data services. With the unsurprising exceptions of AT&T and Verizon Wireless, nearly every commenter in the proceeding voiced strong support for an automatic broadband data roaming right.⁷ These commenters, MetroPCS among them, urge the Commission to adopt an automatic broadband data roaming right in order to enable “new entrants and small, rural and mid-tier carriers [to] be able to provide their customers with meaningful access to wireless data roaming, including next-generation broadband services such as LTE, at reasonable rates.”⁸ Even former opponents of an automatic data roaming right – namely: national players T-Mobile and Sprint Nextel – now have come out in favor of such a

⁴ See Comments of MetroPCS Communications, Inc., WT Docket No. 05-265 (filed Jun. 14, 2010) (“MetroPCS Comments”).

⁵ *Second FNPRM*.

⁶ At present, the automatic roaming rights extend to both in-market and out-of-market services that are real-time, interconnected, two-way switched voice or data services, as well as push-to-talk and text messaging. See *In-Market Roaming Order*.

⁷ See, e.g., T-Mobile Comments; Sprint Nextel Comments; U.S. Cellular Comments; Cellular South Comments; SouthernLINC Comments; Rural Telecommunications Group Comments; Rural Cellular Association Comments. ACS Wireless (“ACS”), the dominant provider of wireless services in Alaska, opposes an automatic data roaming requirement. But, given its unique position of being one of a few carriers in Alaska, coupled with the fact that several national carriers do not operate in Alaska, it is not surprising that ACS is able to secure data roaming from national carriers since the national carriers need the coverage offered by ACS.

⁸ MetroPCS Comments 40.

right due to the increased dominance of AT&T and Verizon Wireless. Indeed, as pointed out by MetroPCS and others, the market for automatic wireless broadband data roaming services is broken and in dire need of regulation.⁹ The Commission should heed the virtual consensus that has formed in the industry and firmly establish an automatic data roaming right.

The *Second FNPRM* also sought comment on the legal and policy basis for mandating automatic broadband data roaming. The Commission expressed its desire to “facilitate the provision of services in a manner that provides the greatest benefit to consumers.”¹⁰ The Commission also noted that broadband deployment is a “key priority for the Commission” and that it “expect[s] that the availability of data roaming services will likely play a major role in the future development of the broadband data market.”¹¹ This finding tracked the *National Broadband Plan*, which recognized that “[d]ata roaming is important to entry and competition from mobile broadband services and would enable customers to obtain access to e-mail, the Internet and other mobile broadband services outside the geographic regions served by their providers.”¹²

In their comments, a number of interested parties provided thoughtful legal analyses of the Commission’s authority to enact data roaming regulations. While many of these legal theories may be viable, MetroPCS submits that regulating automatic broadband data roaming as a common carrier service under the Commission’s Title II authority is the simplest and most judicially sustainable rationale. Further, this legal approach is well grounded given the manner in which automatic broadband data roaming services are provided, and would not require the

⁹ *See infra*, section V.B.

¹⁰ *Second FNPRM* ¶ 50.

¹¹ *Id.* ¶¶ 51-52.

¹² FCC, *CONNECTING AMERICA: A NATIONAL BROADBAND PLAN FOR OUR FUTURE*, 49 (2010) (“*National Broadband Plan*”).

Commission to reverse existing Commission precedent or wade into the contentious debate regarding the Commission's authority over the broadband Internet access services provided to consumers. Significantly, MetroPCS is not alone in its view that automatic broadband data roaming is a Title II service. Numerous other commenters have recognized the Commission's Title II authority to establish an automatic broadband data roaming right.¹³ By regulating automatic broadband data roaming under Title II, the Commission will enact legally enforceable regulations that are consistent with past Commission and judicial precedent and legally sustainable on appeal.

Predictably, AT&T and Verizon Wireless dispute the Commission's authority to regulate data roaming at all. For the first time in the debate, both carriers now contend that automatic broadband data roaming is a "private mobile" service (or, "PMRS"), and thus is restricted from being regulated as a common carrier service by 47 U.S.C. § 332(c)(2).¹⁴ This curious contention is both inaccurate and inappropriate for a number of reasons. First, it is not at all clear that the distinction between CMRS and PMRS found in section 332 is applicable to the wholesale, carrier-to-carrier data roaming service. As is clearly demonstrated in MetroPCS' Comments, the wholesale carrier-to-carrier transmission service at issue here is fundamentally different from the retail service provided to the end user. The better reading of Section 332 is that it is focused on the end user service provided by the carrier, not the various wholesale and other services which are not provided directly to end users.

¹³ See, e.g., Leap Comments 19; Rural Telecommunications Group Comments 5; Cellular South Comments 7; SouthernLINC Wireless Comments 18 (stating that "the Commission has separate and independent authority to take action regarding automatic roaming for all mobile wireless services under Title II of the Communications Act").

¹⁴ AT&T Comments 12; Verizon Wireless Comments 20.

Second, even if the Commission were to find that data roaming is subject to section 332(c), it is not properly classified as a private mobile service. The Act defines PMRS as “any mobile service ... that is not a commercial mobile service or the functional equivalent of a commercial mobile service.”¹⁵ While automatic wireless broadband data roaming provided to the end user is not CMRS, there is little doubt, based on even a passing statutory or technical review, that it is the functional equivalent of CMRS. AT&T has stated – and MetroPCS agrees – that “[d]ata roaming is merely a wholesale, provider-to-provider service that facilitates the offering of another non-interconnected service, wireless broadband Internet access.”¹⁶ As MetroPCS showed in its technical analysis,¹⁷ the wholesale, carrier-to-carrier “transmission provided by the Roaming Partner is functionally equivalent to the telecommunications services provided for voice roaming.”¹⁸ This fact, combined with the substantial empirical market data that show the ever increasing direct substitutability of data services for voice services,¹⁹ clearly demonstrates that data roaming is the functional equivalent of CMRS, and therefore should be regulated as a common carrier service via section 332(c)(2). Further, the wholesale carrier-to-carrier services provided are the functional equivalent of interconnected data services which are already considered common carrier services to which roaming mandates apply.

Third, even if automatic broadband data roaming were considered to be a private mobile service, AT&T and Verizon do not explain how the intertwined inseparable radio portion of the transmission service their networks provide would be subject to a completely different private, as

¹⁵ 47 U.S.C. § 332(d)(3) (emphasis added).

¹⁶ AT&T Comments 16.

¹⁷ MetroPCS Comments 8-17.

¹⁸ *Id.* 7.

¹⁹ For a full analysis of the market factors that weigh heavily in favor of a “functional equivalence” finding, *see infra*, section IV.B.

compared to a commercial, regulatory regime, based merely on the instant in time the spectrum is being used for private mobile service. Since these allegedly private mobile services are being provided over the same radio facilities as CMRS services,²⁰ the Commission has the authority and the ability to deem the facilities and the services provided over them to be CMRS.

Fourth, even if automatic broadband data roaming is considered to be a private mobile service, AT&T and Verizon Wireless erroneously assume that this means the Commission cannot enact rules and regulations relating to that service. The Commission has a long history of regulating many aspects of the services provided over private radio services and nothing in Section 332 would relieve the Commission of that authority.²¹ Even if the Commission is not able to impose the full panoply of common carrier regulation, this does not mean that the Commission is prohibited from imposing reasonable requirements that the private radio service be offered on a wholesale, carrier-to-carrier basis upon reasonable request on just and reasonable terms.

AT&T and Verizon Wireless also each rehash old arguments, suggesting that automatic wireless broadband data roaming is an information service and therefore is not subject to common carrier treatment under Title II. Again, MetroPCS has shown the Commission in great

²⁰ In some cases, AT&T and Verizon Wireless' private mobile services distinction would mean that carriers are free to provide private mobile services over frequencies which are specifically designed only for common carrier services – such as Part 22 licenses. Further, in instances where AT&T and Verizon were required to choose the regulatory status of their wireless stations (*see, e.g.*, 47 C.F.R. § 27.10(b) requiring an initial applicant for Part 27 licenses to “specify in its initial application if it is requesting authorization to provide common carrier, non common carrier” or other services) they generally have designated their licenses to be classified as common carrier in their applications, and they should not now be heard to claim that the spectrum is being used for private mobile services.

²¹ *See* discussion *infra* section IV.E. For example, Section 303(b) provides that the Commission may “prescribe the nature of the service to be rendered by each class of licensed station . . .” Section 303(r) also provides the Commission with the authority to “make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.

detail the severable nature of the wholesale, carrier-to-carrier transmission service that is provided during a data roaming session.²² This severability distinguishes the transmission component of a data roaming session from the inseverable, integrated transmission component that is included when an end-user customer is not roaming.

Verizon Wireless claims that automatic wireless broadband data roaming can be provided either on local breakout (*e.g.*, where the traffic is routed directly to the Internet by the Roaming Partner), or non-local breakout (*e.g.*, where the traffic is routed back to the Home Carrier for connection to the Internet) basis.²³ MetroPCS agrees that long term evolution, or LTE, will permit a carrier both options. However, Verizon Wireless draws an improper conclusion from this. Verizon Wireless claims that, because automatic wireless broadband data roaming *can* be provided on a local breakout basis, it *must* be regulated as an information service.²⁴ First, Verizon Wireless is wrong that local breakout means that the Roaming Partner is providing an information service to the end user. The end user's Internet experience is still dictated and driven by the Home Carrier. The Home Carrier, not the Roaming Partner, decides what services the end user will have access to via the local Internet connection. For example, if the Home Carrier restricts access to adult-oriented web sites, under the local breakout option the Roaming Partner will not provide such access to a roaming customer even though it may allow access to such sites for its own customers. Properly viewed, local breakout is no different than the situation in automatic interconnected voice or data roaming where the traffic is delivered locally by the Roaming Partner to the public switched network. In either case, the calls/connections are

²² See MetroPCS Comments 8-17. MetroPCS also showed that data roaming is properly viewed as a telecommunications service even if viewed on an end-to-end basis.

²³ Verizon Wireless Comments 26; *see also* AT&T Comments 27.

²⁴ Verizon Wireless Comments 27.

dictated and driven by the Home Carrier and its service plans with the end user. The Roaming Partner cannot offer a modified service to the roaming customer; the customer experience is fashioned by the Home Carrier. Viewed in this manner, local breakout clearly is the functional equivalent of the roaming services provided for interconnected voice and data services and therefore should not be treated differently. In either case, all the Roaming Partner is doing is transporting the roaming customer's traffic to another network – be it the PSTN or the Internet.

Second, since the non-local breakout approach clearly must be characterized as a telecommunication service, and local breakout provides the same functionality as non-local breakout, both should be classified as a telecommunications service, not an information service. There is clear precedent for this. In the *2007 Roaming Order* the Commission found that, since short message service, or SMS, could be provided on an interconnected basis, automatic roaming for SMS would be required across the board without regard to how it was in fact being provided in any specific instance.

Further, the incidental DNS lookup service – which is indistinguishable from the routine translation services and functions that occur in the handling of a PSTN call – is not sufficient to turn a discrete telecommunications service into an information service. The definition of information service specifically excludes “any use of such capability [for the generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information] for the management, control, or operation of a telecommunications system or the management of a telecommunication service.”²⁵ Since DNS clearly is provided in connection with routing the telecommunications from the Roaming Partner to a destination chosen by the

²⁵ 47 C.F.R. § 153(20).

customer, the DNS function provided in connection with automatic wireless broadband data roaming is not an information service.

Nor is the fact that certain carriers store customer authentication data as part of a data roaming profile sufficient to perform this “water-into-wine” transformation. Even the manner in which data roaming is offered by carriers indicates that it should be subject to common carrier treatment under the two-pronged *NARUC I* test for common carrier treatment. Together, AT&T and Verizon Wireless offer data roaming to more than 60 percent of the U.S. population. AT&T concedes that “data roaming is already widely available and will continue to develop.”²⁶ Accordingly, there can be little argument that the carriers do not hold out data roaming services to the public. Finally, there are troubling indications of data roaming market failure that simply cannot be ignored.²⁷ These indications, combined with the substantial public interest benefits that accrue from an automatic data roaming right,²⁸ weigh heavily in favor of a finding that data roaming must be subject to common carrier treatment.

In short, the evidence submitted in this proceeding compels a Commission finding that automatic data roaming is a common carrier obligation that is properly regulated under Title II. With a couple of self-interested exceptions, the entire wireless industry supports an automatic data roaming right and points out the importance of prompt Commission action in order to accomplish the important objectives of the *National Broadband Plan*. The Commission should

²⁶ AT&T Comments 6.

²⁷ Likely due to their dominant position in their respective air interfaces, AT&T and Verizon Wireless “are reported to be refusing wireless data roaming or proposing to offer it at prohibitive rates – *e.g.*, at rates where a typical smartphone user could incur hundreds if not thousands of dollars in roaming fees for typical usage.” MetroPCS Comments 26.

²⁸ The Commission’s own *National Broadband Plan* “calls for the increased availability of wireless broadband, and recognizes the integrally important role that wireless data roaming plays in the implementation of the *National Broadband Plan*’s noble aspirations.” MetroPCS Comments 26 (citing *National Broadband Plan* 35, 49).

heed the strong recommendations of this great number of stakeholders and adopt an automatic data roaming right under its Title II authority.

II. THERE IS A VIRTUAL INDUSTRY CONSENSUS THAT AUTOMATIC DATA ROAMING RIGHTS ARE CRITICAL TO BROADBAND DEPLOYMENT

The comments submitted in response to the *Second FNPRM* reveal an uneven – but unsurprising – divide. With only a few predictable exceptions, commenters overwhelmingly voiced their support for automatic data roaming rights.²⁹ Significantly, even former opponents of a data roaming mandate – T-Mobile and Sprint Nextel – now recognize that market forces will not foster the proliferation of data roaming arrangements and have shifted their positions. While both T-Mobile and Sprint Nextel opposed an automatic broadband data roaming right during the Commission’s 2007 comment cycle, each has now come out strongly in favor of Commission regulations guaranteeing data roaming rights.³⁰ This shift in position, which is largely based upon the increasing concentration of wholesale market power in AT&T and Verizon, should be given significant weight in the Commission’s resolution of this important issue. Even if the market for automatic broadband data roaming services was not “broken” in 2007 (though MetroPCS believes it was), compelling record evidence demonstrates that it is broken now.

AT&T and Verizon Wireless seek to defend the *status quo* based on outdated regulatory rationales.³¹ Nationwide automatic broadband data roaming has become table stakes for any

²⁹ See, e.g., T-Mobile Comments; Sprint Nextel Comments; U.S. Cellular Comments; Cellular South Comments; SouthernLINC Comments; Rural Telecommunications Group Comments; Rural Cellular Association Comments.

³⁰ See T-Mobile Comments 1 (“urg[ing] the Commission to adopt a data roaming requirement as soon as possible”); Sprint Nextel Comments 3 (noting that “Sprint believes automatic data roaming obligations are now needed to ensure that carriers can provide services to consumers wherever they may be located at just and reasonable prices”).

³¹ ACS Wireless, the dominant provider of wireless services in Alaska, also opposes an automatic data roaming right, for similar reasons as AT&T and Verizon Wireless.

participant seeking to succeed in the mobile data market. Even AT&T recognizes the critical importance of a nationwide automatic broadband data service offering to potential customers. AT&T's wireless website states, "For most of us, Internet access is no longer a luxury but rather a necessity. It has become an integral part of our daily lives, enabling and enhancing our work, play, and social lives. As a result, our demand for high-speed access anytime, anywhere has increased."³² MetroPCS absolutely agrees with AT&T's assessment of the importance of nationwide data services to consumers. This being the case, the Commission should not allow two increasingly dominant providers – who alone have the ability to significantly impact the nationwide availability of data roaming – to deny consumers access to these important services.

At present, AT&T and Verizon Wireless enjoy an overwhelming advantage over all other carriers – including nationwide carriers as well as small, rural and mid-tier carriers – in terms of the breadth of their geographic data coverage across the country.³³ Prior Commission policies have played a significant role in fostering this situation. The Commission started by creating a regulated duopoly for cellular services that the Commission has never fully overcome, with AT&T having become the successor in large measure to the so-called non-wireless licenses and Verizon Wireless having become the successor in large measure to the wireline licenses. The Commission also has approved a string of acquisition transactions by both AT&T and Verizon Wireless that have served to increase and extend their market positions.³⁴ Having achieved these

³² AT&T Wireless, "AT&T Internet access options," available at <http://www.wireless.att.com/learn/internet/index.jsp>.

³³ Comments of MetroPCS Communications, Inc., WT Docket No. 09-66, 14 (filed Sept. 30, 2009) (noting that "broadband spectrum holdings in the commercial wireless sector have become ever more consolidated in the hands of a few large nationwide carriers") ("*MetroPCS Wireless Competition Comments*").

³⁴ *Id.* 3 (discussing the numerous recent industry consolidations, including Alltel Corporation, Rural Cellular Corporation, Dobson Communications Corporation, SunCom Wireless and Centennial Communications Corporation).

powerful market positions, it is no surprise that AT&T and Verizon Wireless now are taking every opportunity to exercise their near duopoly power and foreclose competition in the wholesale automatic wireless broadband data roaming market to protect and preserve their competitive advantages.³⁵ However, the substantial market power each wields in the roaming market has led to a severe competitive imbalance. This imbalance has been exacerbated by the disappearance through FCC-approved acquisitions of certain regional carriers (*e.g.*, Alltel; Dobson) that once served to add an element of competition to the market for roaming services.³⁶ As these carriers became swallowed up by AT&T and Verizon Wireless, it has become increasingly difficult for small, rural and mid-tier carriers, such as MetroPCS, to obtain roaming, including data roaming services, at reasonable rates and on reasonable terms and conditions – if they are able to obtain data roaming at all. Further, as MetroPCS noted in its original comments, both AT&T and Verizon Wireless “enjoy powerful market positions in their respective air interfaces and frequency bands – an important distinction due to current technological limitations on wireless data roaming compatibility.”³⁷

In sum, based on the competitive advantages they currently enjoy, it is not surprising to see AT&T and Verizon Wireless oppose data roaming mandates in an effort to perpetuate and extend their increasingly dominant positions in the broadband data wireless marketplace.

³⁵ Indeed, AT&T and Verizon Wireless seem intent on re-establishing the old cellular duopoly and further consolidating the industry to increase their market power.

³⁶ *MetroPCS Wireless Competition Comments* 3.

³⁷ MetroPCS Comments 5.

III. REGULATING AUTOMATIC DATA ROAMING AS A COMMON CARRIER SERVICE WOULD PUT THE COMMISSION ON SOLID LEGAL FOOTING

There may be multiple lawful ways for the Commission to exert its authority to regulate automatic data roaming services. However, MetroPCS believes that the best way for the Commission to establish an automatic data roaming right under its existing authority is to proceed to regulate data roaming as a common carrier service under Title II. As MetroPCS previously pointed out, “a finding that the Commission has the authority to regulate wireless data roaming as a Title II common carrier service is well within existing precedent and does not require that the Commission adopt any novel or new legal theories.”³⁸

In its *2007 Roaming Order*, the Commission found that “roaming is a common carrier service, because roaming capability gives end users access to a foreign network in order to communicate messages of their own choosing.”³⁹ Having properly found that interconnected voice and narrowband data roaming must be offered upon reasonable request on just and reasonable terms, the Commission now must also find that broadband data roaming – which occurs using a nearly-identical process to interconnected voice and data roaming – is subject to similar regulatory requirements. Because of the similarities, the Commission would find itself on solid ground in extending the automatic roaming right to wireless broadband data. As one commenter noted, “[t]here is no sound reason as a matter of policy, technology, or law to distinguish between voice roaming and data roaming.”⁴⁰ Indeed, the application of a Title II common carrier analysis to broadband data roaming would allow the Commission to regulate it without overturning any prior decisions or precedent. MetroPCS believes that this is the cleanest

³⁸ *Id.* 3.

³⁹ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817, ¶ 25 (2007) (“*2007 Roaming Order*”).

⁴⁰ Leap Comments 19.

path to causing data roaming services to proliferate in the near term, and the approach that is least susceptible to being overturned via any judicial review. Indeed, such a conclusion would be consistent with the Commission's prior broadband determinations (classifying cable modem service, wireline broadband service, broadband over power lines and wireless Internet broadband service as information services due to the inseparability of the transmission component from the overall information service), as well as the Supreme Court's decision in *Brand X*.⁴¹ Moreover, any determination that broadband data roaming is an information services not a telecommunications service, could undermine these precedents and complicate the Commission's consideration of the Third Way approach to regulating broadband Internet access.⁴²

Many commenters agree with MetroPCS that regulating automatic data roaming as a common carrier service under Title II is a sustainable legal approach. Leap Wireless, for example, states that "data roaming entails a functional and practical distinction between the pure transmission of data and any more complex information services because the central feature of data roaming is the wholesale provision of data transmission to other carriers."⁴³ It is "precisely this 'transmission' quality that makes data roaming fall squarely under the authority of Title II."⁴⁴ This fact, combined with the fact that data roaming is necessary to serve the public interest, means according to Leap that "data roaming may be viewed as both

⁴¹ *National Cable & Telecommunications Association, et al. v. Brand X Internet Services, et al.*, 545 U.S. 967 (2005) ("*Brand X*")

⁴² MetroPCS opposes the use of the Third Way to impose regulations on wireless broadband Internet access services. However, to the extent that the Commission decides to use that approach to regulate wireline broadband Internet access services, classifying the services provided by the Roaming Partner as information services would create substantial problems for the Commission.

⁴³ Leap Comments 20.

⁴⁴ Rural Telephone Group Comments 5.

‘telecommunications’ and a ‘telecommunications service’ subject to common carrier obligations.”⁴⁵ Put succinctly, “Title II of the Act provides the Commission with an additional sufficient and completely independent basis for establishing a data roaming requirement.”⁴⁶

The Commission should not accept Verizon Wireless’ and AT&T’s view that, because automatic wireless broadband data roaming can be provided on a local breakout basis – where the Roaming Partner hands the communication off to the Internet locally rather than routing it back to the Home Carrier – it must be regulated as an information service and be deemed beyond the reach of Commission common carrier regulation.⁴⁷ As pointed out in MetroPCS’ comments and conceded by Verizon Wireless, automatic wireless broadband data roaming also can be provided on a non-local breakout basis where the end user data traffic is routed to the Home Carrier for termination. MetroPCS disagrees with Verizon Wireless’ apparent conclusion that, since *some* forms of data roaming do not entail transmission of the end user’s traffic back to the Home Carrier, then *all* automatic data roaming must be considered an information service. There is no legal basis for this conclusion. When roaming is provided using a local breakout configuration, the service policies governing the customer experience reside within the Home Carrier’s network and are provided to the Roaming Partner when a data session is initiated. The Roaming Partner is acting as an agent and is a mere instrumentality of the Home Carrier’s network who must follow the requirements set by the Home Carrier. Since the Foreign Agent

⁴⁵ Leap Comments 19.

⁴⁶ Cellular South Comments 7; *see also* SouthernLINC Wireless Comments 18 (stating that “the Commission has separate and independent authority to take action regarding automatic roaming for all mobile wireless services under Title II of the Communications Act”).

⁴⁷ In an interesting inconsistency, AT&T argues that “technical standards for 4G roaming have not yet been completed.” AT&T Comments 9. That is patently untrue. In fact, the non-local and local breakout options that Verizon Wireless discusses will be available in 4G LTE and are part of the technical fabric being implemented by the major network infrastructure providers.

only acts as required by the Home Carrier, any functions undertaken by the Foreign Agent are part and parcel and an extension of the Home Carrier service and thus the Roaming Partner, acting through its Foreign Agent, should not be considered to be providing a separate information service. Although Verizon Wireless suggests that certain data services (such as e-mail) could be provided by the Roaming Partner, in reality any such data services will continue to be provided by the Home Carrier (not the Roaming Partner).

Moreover, in non-local breakout, the Foreign Agent directs all traffic back to the Home Agent. This may be done via dedicated facility, through transit carriers, or through an Internet Protocol connection utilizing the public Internet. Since in either case the data traffic is connected to the Internet and the customer experience is the same, there is no legal basis to distinguish between the two methods based solely on how or whether the data is transported back to the Home Carrier. The Commission already has established the precedent in the automatic roaming context that similar services provided by different network configurations should be given the same regulatory treatment. For example, in the *2007 Roaming Order*, the Commission found that SMS is provided on both an interconnected and non-interconnected basis.⁴⁸ The Commission concluded that since it *could* be provided on an interconnected basis, no matter how SMS was provided, SMS would be treated as a common carrier service within the ambit of the automatic roaming requirements regardless of how the service was actually provided in any particular case. The Commission should draw the same conclusions here and find that, since non-local breakout clearly is a telecommunication service, the local breakout option should be treated the same.

⁴⁸ *2007 Roaming Order* ¶ 55.

Due to the simple, unremarkable manner in which the Commission may regulate data roaming under Title II, and the broad support such a legal theory enjoys across the mobile wireless services industry, MetroPCS reiterates its recommendation that the Commission regulate automatic data roaming under this theory. Doing so will help the Commission stay well within the bounds of its statutory authority, to remain consistent with past FCC decisions and judicial precedent, and to substantially reduce the probability of being overturned on appeal.

IV. DATA ROAMING IS NOT A “PRIVATE MOBILE” SERVICE WITHIN THE MEANING OF 47 U.S.C. § 332(C)(2)

AT&T and Verizon Wireless overreach and make the claim that any “undertaking by the Commission to reclassify data roaming ... as a telecommunications service would be futile because of the clear directive of Congress in Section 332(c) that private mobile services not be subjected to common carrier regulation.”⁴⁹ Interestingly, this argument is completely absent from their 2007 comments on data roaming, which is noteworthy given the importance they attribute to it now. In any event, at its core, this argument is based upon the distinction in Section 332 between “commercial mobile service,” which shall be treated as a common carrier service under section 332(c)(1), and “private mobile service” (or, “PMRS”) which is accorded non-common carrier treatment under section 332(c)(2). The problem for AT&T and Verizon is that simply calling data roaming a private radio service does not make it so. Proper analysis reveals that the wholesale, carrier-to-carrier transmission component of a data roaming session simply is not a “private mobile service” within the meaning of 47 U.S.C. § 332(c)(2). In addition, section 332 was never intended to govern the type of wholesale, carrier-to-carrier services that data roaming encompasses, and was instead intended to draw distinctions between the regulatory treatment to be accorded to distinct classes of retail services provided to end-users.

⁴⁹ AT&T Comments 20; Verizon Wireless Comments 20.

Simply put, data roaming is not subject to the restriction on common carrier treatment that Congress applied to PMRS, and may properly be regulated by the Commission under Title II.

In relevant part, section 332(c)(2) states:

Non-common carrier treatment of private mobile services. A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this Act.⁵⁰

This section only applies to those services defined by the Commission as “private mobile services,” which are defined in section 332(d)(3) as:

[A]ny mobile service (as defined in section 3 [47 USC § 153]) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.⁵¹

As was shown by MetroPCS in the detailed technical analysis of the data roaming process which was included in its original comments, in the most common configuration, voice roaming (which has been found by the Commission to be CMRS) and data roaming occur in precisely the same manner.⁵² Both voice and data are sent over the same transmission path between the Home Carrier and the Roaming Partner. As a result, MetroPCS specifically referenced the functional equivalence between voice roaming and data roaming, stating that when “[p]roperly viewed, the transmission provided by the Roaming Partner is functionally equivalent to the telecommunications services provided for voice roaming.”⁵³ In addition, as is discussed in greater detail below, voice and data service are increasingly viewed as substitutable services by end users. Finally, if indeed any portion of the transmission is deemed to be a private mobile service, it is so fully intertwined with the CMRS services provided over the same facility as to be

⁵⁰ 47 U.S.C. § 332(c)(2).

⁵¹ 47 U.S.C. § 332(d)(3) (emphasis supplied).

⁵² See MetroPCS Comments 8-17.

⁵³ *Id.* 7.

inserverable. The private-commercial mobile services distinction was designed to be applied to severable services – not to fully integrated services where the same facilities are used on an indistinguishable basis and where both private and commercial services are intermixed simultaneously. Thus, to the extent that Roaming Partners are deemed not to be offering CMRS services because certain data services are not “interconnected” with the PSTNs, the Commission must find wireless data roaming service to be a “functional equivalent” of voice roaming, which was found by the Commission to be a common carrier CMRS service.⁵⁴ Finally, even if broadband data roaming is a private mobile service, the Commission nonetheless has the authority to impose automatic requirements with regard to it.

A. Data Roaming is Properly Viewed as a Wholesale, Carrier-to-Carrier Service

MetroPCS previously indicated that, “if the Home Carrier is viewed as the wireless data roaming ‘customer’ – which is the better view in the opinion of MetroPCS – it seems self-evident that what is being provided is a simple wholesale transmission/telecommunications service.”⁵⁵ Numerous other commenters also properly conclude that data roaming “is a wholesale carrier-to-carrier transmission service.”⁵⁶ Even AT&T agrees with this view, stating

⁵⁴ Section 20.9(a)(14)(ii) notes that any interested party “may seek to overcome the presumption that a particular mobile radio service is a private mobile radio service by filing a petition for declaratory ruling challenging a mobile service provider’s regulatory treatment as a private mobile radio service.” 47 C.F.R. § 20.9(a)(14)(ii). The use of the word “may” rather than “must” certainly allows the Commission to make such a determination here, in the context of a full notice-and-comment rulemaking in which all affected parties are able to participate.

⁵⁵ MetroPCS Comments 18.

⁵⁶ SouthernLINC Comments 18; Cellular South Comments 7 (“automatic data roaming is a wholesale service, provided by one carrier to another carrier, that does not involve any provision of service to a retail end-user customer”); Leap Comments 20 (“the central feature of data roaming is the *wholesale* provision of data transmission to other carriers”) (emphasis in original).

that “[d]ata roaming is merely a wholesale, provider-to-provider service that facilitates the offering of another non-interconnected service, wireless broadband Internet access.”⁵⁷

Given this consensus, which AT&T joins, the Commission should determine that the transmission component of a data roaming session is a wholesale, carrier-to-carrier service. Viewed on this proper carrier-to-carrier basis, there can be no serious doubt that voice roaming and data roaming are functionally equivalent because the intercarrier transmission components of a voice and a data roaming session are nearly identical. In the final analysis, the telecommunications/transmission component of data roaming is indistinguishable from and, thus functionally equivalent to, that same component of voice roaming, which the Commission has found to be CMRS.⁵⁸

B. Data Roaming is the Functional Equivalent of CMRS

The Commission’s rules set forth specific criteria to consider when making a determination as to functional equivalence. The factors to consider are set forth in 47 C.F.R. § 20.9(a)(14)(ii)(B), which states in relevant part:

“[a] variety of factors will be evaluated to make a determination whether the mobile service in question is the functional equivalent of a commercial mobile radio service, including: consumer demand for the service to determine whether the service is closely substitutable for a commercial mobile radio service; whether changes in price for the service under examination, or for the comparable commercial mobile radio service would prompt customers to change from one service to the other; and market research information identifying the targeted market for the service under review.”⁵⁹

A consideration of these factors clearly shows that the wholesale, carrier-to-carrier transmission component of data roaming is the functional equivalent of CMRS.

⁵⁷ AT&T Comments 16.

⁵⁸ *See 2007 Roaming Order.*

⁵⁹ 47 C.F.R. § 20.9(a)(14)(ii)(B).

1. Consumer Demand, Price Sensitivity and Consumer Behavior Show That Data Service is Closely Substitutable for CMRS

The Commission's own analysis of the market for mobile wireless services clearly shows the rise of data as an important form of mobile communication that is becoming a common substitute for voice services. In its recent *Fourteenth Report*, the Commission expressly found that "[t]he decline in voice minutes-of-use, coupled with the increase in data use, suggests that although only about 40 percent of consumers currently use data services, these consumers may be substituting data services, such as text messaging, for traditional voice services."⁶⁰ This conclusion is inarguable. If a customer is unable to reach a friend on their mobile voice number, they often send a text message, an email, post on a Facebook wall or send a tweet. In fact, in many circumstances, Facebook walls and Twitter accounts are the first point of contact, especially among younger consumers. Consumer behavior has made it abundantly clear that "consumers are increasingly substituting among voice, messaging, and data services, and in particular, are willing to substitute from voice to messaging or data services for an increasing portion of their communication needs"⁶¹

The functional equivalence of voice and data services is becoming even more obvious as voice services move to an IP platform. As voice over IP ("VoIP") technology has matured and become integrated into mobile networks, fewer voice calls end up being patched into the public switched telephone network ("PSTN").⁶² The Commission has specifically found that "[f]rom the perspective of a customer making an ordinary telephone call ... interconnected VoIP service

⁶⁰ *Fourteenth Report* ¶ 4.

⁶¹ *Id.* ¶ 8.

⁶² Verizon Wireless recently announced its deal with Skype to provide Skype VoIP services over Verizon Wireless phones. See "Skype Mobile" announcement on the Verizon Wireless website, available at <http://phones.verizonwireless.com/skypemobile/>.

is functionally indistinguishable from traditional telephone service.”⁶³ The same is true of wireless voice calls using VoIP and those transmitted using the PSTN. The plain truth is that historical regulatory distinctions based upon whether a service is or is not interconnected with the PSTN have lost any practical meaning in an IP world. Congress wisely foresaw this possibility and did not base its regulatory classifications solely on pre-existing legacy network configurations. Rather, it recognized that similar, substitutable services should be subject to comparable regulatory treatment, and thus built a “functional equivalent” test into Section 332. As this move to an “all data” world continues, there can be no serious question that automatic data roaming is indeed the functional equivalent of automatic voice roaming, which the Commission already has properly found to be a common carrier service that must be provided upon reasonable request.

2. Empirical Data Shows that Voice and Data Are Viewed As One Market

As a general matter, wireless data services are not being marketed to consumers on a stand-alone basis, but rather must be tied as an adjunct to a voice plan. Indeed, the Commission’s own *Fourteenth Report* looks at a single market for “mobile wireless services,” which includes both data and voice, with no breakdown of market shares for the two.⁶⁴ Indeed, the Commission specifically indicated that it views all mobile wireless services as being part of a single market, consisting of substitutable voice and data components, stating that “[f]rom the standpoint of competitive analysis, [the Commission has considered] the mobile wireless services industry as a whole rather than providing separate competitive analyses of all of the

⁶³ *IP-Enabled Services*, Report and Order, 24 FCC Rcd 6039, ¶ 12 (2009).

⁶⁴ See generally *Fourteenth Report*.

various segments.”⁶⁵ When the Commission itself treats data and voice services as so substitutable and intertwined as to effectively constitute one market, there can be no doubt that the voice and data segments must be treated as functional equivalents of one another.

The Commission further recognizes that wireless service providers often “offer voice and data services using the same spectrum and network infrastructure.”⁶⁶ Accordingly, the two services (voice and data) are best viewed as substitutes existing in a single market, due to the difficulty in “extricate[ing] the cost structure of different services, which would be essential in determining comparative profitability or other important analyses.”⁶⁷ Additionally, the Commission makes note of the bundled nature of the typical voice and data offerings that are available to consumers. Specifically, the *Fourteenth Report* found that “consumers typically receive mobile voice and data services on a single end-user device and purchase these services from a single provider.”⁶⁸ For the most part, “mobile wireless subscribers who use their handsets for data services typically purchase these services as either an add-on to voice services or as part of a bundled voice and data plan.”⁶⁹ Not only is this bundling arrangement typical, but in fact “in some cases, [consumers] may not be able to purchase data services independent of voice services.”⁷⁰

The Commission has long recognized that, where data and voice services are bundled, the two should be viewed as a single integrated service. A decade ago, the Commission elected to treat bundled packages of basic and enhanced services as an integrated whole because “neither

⁶⁵ *Fourteenth Report* ¶ 20.

⁶⁶ *Id.* ¶ 21.

⁶⁷ *Id.*

⁶⁸ *Id.* ¶ 22.

⁶⁹ *Id.*

⁷⁰ *Id.*

subscribers nor resellers can purchase the [basic] service component of the bundle from one provider and the enhanced services component of the bundle from another provider.”⁷¹ The same conclusion is appropriate for bundled wireless voice and data services today. Under nearly all circumstances, consumers simply are not able to purchase data on their mobile handsets independently from voice service. A visit to the retail store of any nationwide carrier will confirm this fact.⁷²

The Commission has set as an objective that, “if consumers desire particular services or combinations of services in the future, a variety of CMRS providers should have the opportunity to use different technological configurations to meet this customer demand in competition with other CMRS carriers.”⁷³ The ultimate Commission aim is to create an “enduring regulatory regime under which substantially similar services are subject to symmetrical regulation and the marketplace shapes the development of mobile services to meet customer demands.”⁷⁴ This goal can only be achieved if voice roaming and data roaming services are treated as functional equivalents. The market data show that wireless service providers currently are using “different

⁷¹ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 16340, ¶ 30 (1999).

⁷² The four nationwide carriers (AT&T, Verizon Wireless, Sprint Nextel and T-Mobile) offer limited data-only plans to handsets, for the use of deaf or hearing impaired consumers unable to use voice services. These specialized offerings are not mass marketed to the majority of customers as an alternative to a voice and data bundle, in many cases are not available to non-deaf or hard-of-hearing consumers at all and cannot be deemed to alter the regulatory character of the primary services offered by these carriers. See Ian Wheat, “Android for the disabled: Carrier friendliness,” AndroidAndMe.com, (Feb. 18, 2010), available at <http://androidandme.com/2010/02/news/android-for-the-disabled-carrier-friendliness/>. The four nationwide carriers also offer certain data-only services for laptops using data cards. This discrete service also is functionally different from the primary services offered by these carriers since the data card is incapable of offering voice services. Again, these niche services should not alter the proper regulatory classification of the mainstream services.

⁷³ *Implementation of Section 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, ¶ 69 (1994).

⁷⁴ *Id.* (emphasis supplied).

technological configurations” – *i.e.*, data offerings and voice offerings – to provide substantially similar and substitutable communications services. Because voice and data are “substantially similar services,” the Commission must ensure that the transmission component of data roaming and the transmission component of voice roaming are “subject to symmetrical regulation.”⁷⁵

The fact that the Commission desires to regulate similar services in a similar manner, and the fact that data roaming meets the factors designed to test functional equivalence, each weigh heavily in favor of a Commission finding that the transmission component of data roaming should be regulated as a common carrier service under Title II. For example, Section 20.9(a) of the Commission’s rules provides that CMRS services and mobile services that are the functional equivalent of CMRS shall be treated as common carrier services:

The following mobile services shall be treated as common carriage services and regulated as commercial mobile radio services. . . .
(14) A mobile service that is the functional equivalent of a commercial mobile radio service.⁷⁶

Since MetroPCS has demonstrated above that data roaming is functionally equivalent to voice roaming, which is a CMRS service, data roaming must be regulated as a Title II common carrier service under Commission Rule 20.9.

3. The Transmission Services Provided by the Broadband Data Roaming Partner are Functionally Equivalent to the Services Provided During Voice Roaming

The Commissions also should find that the transmission services provided for data roaming are functionally equivalent to the transmission services provided for interconnected voice and data roaming because the same radio facilities are used to perform comparable functions in both instances. The facilities used to provide the intercarrier transmission services

⁷⁵ *Id.*

⁷⁶ 47 C.F.R. § 20.9(a), 20.9(a)(14).

in connection with broadband data roaming (which AT&T and Verizon Wireless argue are private mobile radio) and interconnected narrowband data roaming (which already has properly been found by the Commission to be a common carrier service and CMRS) are intertwined and inseverable and thus must be considered functional equivalents. For example, the radio portion of the two services is identical in that both use the same licensed spectrum, transmitters, antennae, and feedline. Further, each uses common backhaul facilities to transport the traffic from the cell site back to the mobile telephone switching office and in many cases the traffic is combined on DS-3 or Ethernet facilities. These common shared facilities are inseverable and intermixed services transmitted over them should be treated for regulatory purposes as functional equivalents. It would make no sense for the Commission to draw regulatory distinctions based on the content or ultimate destination of information that is being transported over the radio network since the intercarrier aspects remain largely unchanged. It is unworkable for the Commission to try to determine the regulatory treatment based on the character of each digital packet of information that is being transmitted. Once again, the Commission should take the sound approach it used with respect to SMS services in the *2007 Roaming Order*. Since SMS could be provided on both an interconnected and non-interconnected basis the Commission decided that all SMS was to be subject to a single regulatory scheme and regulated as a common carrier service – no doubt because the two services are functionally equivalent and substitutable. This is especially appropriate given that licensees have applied for their licenses to provide CMRS services. Here, since common facilities are being used to perform comparable functions, common carrier treatment is appropriate even when the facilities are sending packets of information which are not destined to be interconnected with the PSTN.

C. Section 332 Was Never Intended to Apply to Wholesale, Carrier-to-Carrier Services Such As Data Roaming

The foregoing discussion demonstrates that, even if the Commission decides that data roaming is a mobile service that must be classified either as CMRS or PMRS under section 332, the functional equivalence of the service to CMRS justifies common carrier treatment. Nevertheless, the more fundamental question may be whether wireless data roaming is even a type of service to which the CMRS/PMRS dichotomy should be applied. Prior Commission decisions indicate that section 332, and subsection 332(c)(2) on which AT&T and Verizon rely, was not intended to apply to wholesale, carrier-to-carrier services such as data roaming. The definition of “private mobile service” in section 332 was adopted to replace, and intended to apply to, pre-existing “private land mobile services.”⁷⁷ Prior to the 1993 Budget Act which added section 332, the Act defined “private land mobile service” as:

a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by *eligible users* over designated areas of operation.⁷⁸

The reference to “eligible users” in this definition clearly indicates that private land mobile service was a retail service offered by carriers to end user customers. The described services did not, and were not intended to, apply to the types of wholesale carrier-to-carrier services provided in the data roaming context. The D.C. Circuit has noted that private land mobile services typically consisted of “safety operations (*e.g.*, roadside assistance and volunteer fire departments), systems used by school bus drivers or for disaster relief and businesses requiring

⁷⁷ H.R. REP. NO. 103-213, at 496 (1993) (Conf. Rep.).

⁷⁸ 47 U.S.C. § 153(gg) (deleted by Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, § 6002 (1993)) (emphasis supplied).

specialized internal paging services like private ambulance companies.”⁷⁹ Clearly, none of these end user services even approximate the type of intercarrier services offered by Roaming Partners to Home Carriers. Properly viewed, section 332 was intended to draw a distinction between the regulatory treatment to be accorded to two distinct categories of retail mobile services: (1) those offered for profit to sufficient categories of users to be deemed being offered indiscriminately to the public,⁸⁰ and, (2) those offered to a sufficiently restricted class of users to be deemed “private” rather than “public” offerings. These two distinct classes of retail offerings simply have no relevance to the wholesale intercarrier services that AT&T and Verizon are providing when they handle data roaming calls. For example, the Commission recently interpreted provisions of section 332 as applying only to “retail charges to end users of CMRS, rather than to termination charges to other carriers associated with CMRS.”⁸¹ This further supports the view that data roaming is a wholesale, carrier-to-carrier service, and not the type of retail service to which section 332(c)(2) would apply. Consequently, the effort of AT&T and Verizon to find refuge in the private radio definition should fail.

Indeed, Verizon and AT&T should be estopped from making the claim that the wireless services they provide to patch MetroPCS roaming customers through to the MetroPCS network are “private” services. Both of these carriers, in the course of applying for 700 MHz spectrum licenses in Auction 73, selected “common carrier” under the “Regulatory Status” section of their applications.⁸² This question derives from 47 C.F.R. § 27.10(b) which requires Part 27

⁷⁹ *American Assoc. of Paging Carriers v. FCC*, 442 F.3d 751, 754 (2006).

⁸⁰ *See* 47 U.S.C. § 332(d)(1).

⁸¹ *See, e.g., North County Communications Corp. v. MetroPCS California, LLC*, 24 FCC Rcd 3807, ¶ 11.

⁸² *See* Question 41, ULS File Nos. 0003382436 and 0003382435 (showing that both AT&T and Verizon Wireless each selected “Common Carrier” – and no other service type – in response to

applicants to designate the regulatory status of the facilities for which they are seeking to be licensed. Because the relevant question on the Auction 73 applications asks applicants to “enter all [service offerings] that apply,” either carrier would have been welcome to indicate that they intended to provide private or non-common carrier services, as they now claim. However, both purposefully opted only for common carrier status on their 700 MHz networks, which undoubtedly are being used to provide roaming services under these circumstances. AT&T and Verizon should not be now heard to argue that they are now acting as private carriers simply because they find it to be an expedient means to avoid common carrier roaming regulation. Based on the above, it is clear, for any number of reasons, that AT&T’s and Verizon Wireless’ reliance on section 332(c)(2) to excuse any potential data roaming obligations is completely misplaced.

D. Commission Precedent Indicates That Certain Operations of a PMRS Carrier May Still Be Regulated Under Title II

The foregoing discussion indicates that AT&T and Verizon are incorrect in asserting that wireless data roaming services are PMRS. Nevertheless, the fact remains that a PMRS classification would not end the inquiry. Although AT&T and Verizon Wireless point to the language of section 332(c)(2) as an ironclad bar to the application of Title II regulation to data roaming, Commission precedent indicates that certain operations of a PMRS carrier may be subject to Title II common carrier regulation.

In proceedings implementing the 1996 Act, the Commission concluded that “to the extent that a PMRS provider uses capacity to provide domestic or international telecommunications for

the request “This filing is for authorization to provide or use the following type(s) of radio service offering (enter all that apply):”).

a fee directly to the public, it will fall within the definition of ‘telecommunications carrier’ under the Act.”⁸³ The Act defines a “telecommunications carrier” as:

any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 [47 USCS § 226]). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

MetroPCS already has shown that carriers providing wholesale, carrier-to-carrier data roaming services are “engaged in providing telecommunications services.”⁸⁴ Specifically, MetroPCS showed that “[t]he form and content of the data information being transmitted or received is not changed during this process by the Home Carrier’s network. Accordingly, this transmission meets the definition of ‘telecommunications.’”⁸⁵

Further, MetroPCS detailed why “the transmission service provided by the Roaming Partner [also] satisfies the Commission’s two-prong test for common carrier treatment, as set forth in the *NARUC I* decision.”⁸⁶ Since MetroPCS has conclusively shown that data roaming is telecommunications, by logical extension, and by statutory definition, any provider of data roaming services is a telecommunications carrier. Because providers of data roaming are telecommunications carriers, the *LEC-CMRS Order* is Commission precedent standing for the proposition that a provider of PMRS, to the extent that it provides domestic or international

⁸³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶ 993 (1996) (“*LEC-CMRS Order*”).

⁸⁴ MetroPCS Comments 20-22.

⁸⁵ *Id.* 12.

⁸⁶ *Id.* 18 (citing *NARUC I*, 525 F.2d 630; *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 40 (1998)).

telecommunications for a fee to the public,⁸⁷ will be classified as a telecommunications carrier and properly regulated as a common carrier under Title II.

The Commission also indicated that PMRS may be regulated under Title II in its *Wireless Broadband Order*. In that order, the Commission stated that “if a wireless broadband Internet access provider chooses to offer the telecommunications transmission component as a telecommunications service, then it is a common carrier service subject to Title II.”⁸⁸ This unremarkable conclusion supports MetroPCS’ view of Title II regulation of data roaming, as providers of data roaming do, in fact, “offer the telecommunications transmission component [of broadband Internet access] as a telecommunications service” as a wholesale, carrier-to-carrier service. However, the Commission goes on to state:

[i]n addition, a mobile wireless Internet access provider that chooses to offer the telecommunications transmission component as a telecommunications service may also be subject to the ‘commercial mobile service’ provisions of the Act, depending on whether that transmission service falls within the definition of CMRS in the Act.

The Commission’s statement here is unmistakable. As an initial matter, a provider separately offering the telecommunications transmission component of data roaming will be regulated as a common carrier. Next, the Commission states that in addition to regulation under Title II, such a provider may also be regulated as a provider of CMRS. As shown above, a mobile wireless

⁸⁷ MetroPCS previously has shown that AT&T’s and Verizon Wireless’ offering of data roaming services to nearly 60 percent of U.S. consumers surely constitutes offering data roaming to “such [a] class [] of users as to be effectively available directly to the public.” MetroPCS Comments 24 (citing 47 U.S.C. § 153(46)). In any event, MetroPCS also showed that the “first prong of the *NARUC I* [for common carrier regulation] test may also be met where Roaming Partners offer their wireless data roaming services to a wide variety of third party carriers. Verizon Wireless’ recent rural LTE roaming initiative constitutes just such a circumstance.” MetroPCS Comments 25.

⁸⁸ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶ 33 (2007).

service is either CMRS, the functional equivalent of CMRS, or PMRS – these three options occupy the field of mobile services. Thus, if a telecommunications transmission service that is properly regulated under Title II is not CMRS (or its functional equivalent), then it must be PMRS. In making this determination, the Commission demonstrates its belief that certain non-CMRS services could and should be regulated as common carrier services under Title II.

These Commission decisions, each still good law, further undermine AT&T's and Verizon Wireless' argument that a finding that data roaming is PMRS somehow exempts the service from Title II regulation. These decisions show that the Commission has the ability to regulate PMRS under Title II, and has exercised its discretion to do so in the past. This fact, combined with MetroPCS' conclusive showing that, in the first instance, data roaming is not PMRS, effectively precludes AT&T and Verizon Wireless from relying on their stretched interpretation of section 332(c)(2).

E. The Commission Can Still Regulate Automatic Broadband Data Roaming Even if it is Deemed a Private Mobile Service

AT&T and Verizon Wireless incorrectly assume that, if automatic wireless broadband data roaming is private mobile service, then the Commission cannot adopt reasonable regulations requiring that it be provided in the public interest. That assumption is demonstrably false. The Commission has ample statutory authority to regulate the provision of automatic data roaming even if it is deemed to be a private mobile service.

By seeking to invoke section 332 of the Act, the AT&T and Verizon arguments are premised on the view that automatic broadband roaming service is a private mobile service. However, private mobile services still are subject to Title III. Title III gives the Commission considerable regulatory authority. For example, section 303 of the Act provides, in relevant part:

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall --

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act,

This section provides the Commission with adequate authority to adopt reasonable regulations found to be in the public interest governing automatic data roaming service even if it is classified as a private mobile service. Since, according to AT&T and Verizon, automatic roaming is a “mobile service,” the Commission under section 303(b) can “[p]rescribe the nature of the service.” This necessarily includes the ability to limit what services can be provided by a licensee, but also includes the ability to adopt regulatory mandates governing the nature and conditions applicable to the services which a licensee will be required to provide as a licensee.

The Commission’s authority in this regard is conclusively demonstrated by the broad array of rules and regulations that the agency has adopted governing the manner in which private mobile radio services are provided. For example, Part 90, governing the Private Land Mobile Radio Services contains:

- § 90.18 – mandating nationwide interoperability standards for the public safety 700 MHz broadband network;
- § 90.155 – imposing mandatory construction completion deadlines;
- § 90.157 – establishing standards governing the discontinuance of operations;
- § 90.179 – governing the shared use of private radio facilities;

- § 90.407 – authorizing special use operations in a manner other than that specified in the license to facilitate emerging communications; and,
- § 90.477 – governing the permissible methods and requirements for interconnecting private systems with the PSTN.

The Commission also has adopted regulations governing other non-common carrier mobile radio services which impose various duties on the licensee dictating the manner in which they provide services. For example, Subpart A of Part 95 governing the General Mobile Radio Service (“GMRS”) contains mandates regarding channel sharing (§ 95.7), the cooperative use of GMRS stations (§ 95.33), licensee duties with regard to station operation and operating personnel (§ 95.103); the manner in which the station must be operated in an emergency (§ 95.143); and the identity of individuals who may participate in station operations (§ 95.179). The scope of these rules further confirms that the Commission has broad authority over private mobile radio services. AT&T and Verizon have failed to point to any authority that would prevent the Commission from exercising its broad regulatory power over PMRS licensees to foster automatic broadband data roaming.

To be sure, section 332(c) contemplates that a private mobile service carrier shall not be “treated as a common carrier.” All this means is that a private carrier cannot be subjected to the entire panoply of Title II common carrier regulation. It does not mean that the Commission lacks the power to impose reasonable operating conditions that might have some corollary under Title II. In this regard, MetroPCS notes that many of the aforementioned regulations applied to private mobile stations have close counterparts in the rules governing CMRS common carrier stations. *Compare* § 90.155 *with* § 27.14 (construction requirements); § 90.157 *with* § 27.06 (discontinuance of service); § 90.407 *with* § 22.307 (emergency operations); § 90.477 *with* § 20.11 (interconnection). This demonstrates that the limitation on regulatory private mobile

stations as common carrier stations does not mean that the Commission is powerless to adopt reasonable regulations governing private mobile radio stations in the public interest which happen to have a parallel provision in a regulated common carrier service.

Based on the foregoing, subsections (b) and (r) provide the Commission with authority to require every wireless licensee to provide automatic data roaming services on a just and reasonable basis. The only limitation which Section 332 would impose (if automatic data roaming is considered private mobile service) is that the Commission could not treat this *per se* as a common carrier service and automatically subject it to the full range of common carrier regulation. Notably, since both AT&T and Verizon Wireless argue that the provision of automatic data roaming to roaming partners is not providing service to the public, the requirement that carriers provide automatic data roaming strictly on a wholesale carrier-to-carrier basis cannot be seen as requiring that it be provided to the public indiscriminately and this does not meet the *sine qua non* of common carrier regulation. Accordingly, requiring that such service be provided upon reasonable request on just and reasonable terms on a wholesale, carrier-to-carrier basis cannot be considered subjecting such service to common carrier regulation. Therefore, even if the Commission finds that automatic data roaming is a private mobile service, the Commission has ample authority to require carriers to provide it on just and reasonable rates.

V. WIRELESS DATA ROAMING MEETS THE TESTS FOR COMMON CARRIER TREATMENT

AT&T and Verizon argue that common carrier regulation of data roaming is inappropriate because data roaming does not satisfy either of the *NARUC I* tests for common carrier treatment.⁸⁹ These arguments must fail. As MetroPCS described previously,

⁸⁹ Verizon Wireless Comments 28; AT&T Comments 29.

a service [is] a common carrier service under the *NARUC I* test where: (i) the provider's actions (*i.e.*, the indiscriminate offering of service to a broad class of users) reflect the desire or intention to serve the public indiscriminately as a common carrier, or (ii) the Commission makes a determination that the public interest requires the service to be offered indiscriminately to the public by the provider. If a service satisfies either prong of the two-part *NARUC I* test, the service is properly regulated as a common carrier service.⁹⁰

In this case, AT&T and Verizon Wireless each satisfy both prongs of the *NARUC I* test, where satisfaction of only one prong of the test would suffice. Both offer data roaming services to the public, and sufficient evidence of market failure exists to warrant a finding that common carrier treatment of data roaming is required in the public interest.

A. AT&T and Verizon Wireless Each Offer Data Roaming Services To the Public

Verizon Wireless improperly contests regulation of data roaming under Title II based on the contention that “[d]ata roaming is ... not a telecommunications service for the independent reason that it is not offered on a common carrier basis.”⁹¹ This stated reason simply is not accurate. As MetroPCS displayed in its comments, AT&T and Verizon Wireless make data roaming services available to their own customers which constitute approximately 60 percent of the total American population.⁹² This fact alone shows that data roaming is offered to a sufficient number of customers to effectively be offered to the public at large. In addition, data

⁹⁰ MetroPCS Comments 23.

⁹¹ Verizon Wireless Comments 28.

⁹² MetroPCS Comments 24. AT&T reported a total of 87.0 million subscribers in its latest quarterly report. “Wireless Broadband Growth, Further Advances in IP-Based Services, Strong Margins and Cash Flow Highlight AT&T's First-Quarter Results,” Press Release (Apr. 21, 2010), available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=30761&mapcode=financial>; see also “Verizon Reports Continued Growth in Cash Flow in 1Q; Solid FiOS, Wireless Growth in Customers and Revenues,” Press Release (Apr. 22, 2010), available at <http://investor.verizon.com/news/view.aspx?NewsID=1049>.

roaming services are offered to the public at large as part of each company's well publicized service offerings.⁹³ By broadly advertising data services throughout the country, AT&T and Verizon Wireless are directly making an offer of data roaming services to the public as a whole. Verizon Wireless also is offering data roaming to a broad cross-section of carriers as part of its rural LTE initiative.⁹⁴ Moreover, both Verizon Wireless and AT&T "offer wireless data roaming services to a number of other carriers, including MVNOs which are actively competing in the wireless space."⁹⁵ Finally, Verizon Wireless and AT&T each recently announced that they have joined the "Wireless Broadband Alliance" to offer roaming Wi-Fi data access to all others in the alliance. In doing so, the two carriers "have joined an organization that ensures roaming among mobile operators' Wi-Fi networks."⁹⁶ These facts, individually and in the aggregate, establish unquestionably that the manner in which AT&T and Verizon Wireless offer data roaming constitutes an offering of data roaming services to the public.

⁹³ See AT&T's data coverage map showing potential customers the numerous areas in which they are permitted to use data services outside of their home market. <http://www.wireless.att.com/coverageviewer/#?type=data>.

⁹⁴ MetroPCS Comments 25 (discussing Verizon Wireless' recently announced plans to provide complementing LTE data roaming agreements to rural carriers offering service in areas that Verizon Wireless itself does not cover). See "LTE in Rural America," <http://aboutus.vzw.com/rural/Overview.html>.

⁹⁵ MetroPCS Comments 24 (also noting that "[t]he retail rates offered by these MVNOs to their customers (which presumably include a measure of profit for both the MVNO and carrier offering the wholesale data services) are substantially lower than the rates offered by either AT&T or Verizon Wireless to small, rural and mid-tier carriers requesting wireless data roaming services – a pricing discrepancy that may indicate anticompetitive behavior").

⁹⁶ Stephen Lawson, "AT&T, Verizon join Wi-Fi roaming group," IDG News Service (Jun. 21, 2010), available at <http://www.networkworld.com/news/2010/062110-att-verizon-join-wi-fi-roaming.html?hpg1=bn>.

B. The Broken State of the Market for Data Roaming Services Shows Cause for Common Carrier Regulation of Data Roaming Under a *NARUC I* Analysis

Although satisfaction of the first prong of the *NARUC I* test is sufficient to justify regulating automatic wireless data roaming as a common carrier service, it also is clear that sufficient evidence of market failure exists to warrant a finding that the public interest will be served by treating data roaming as a common carrier service. AT&T, however, argues that common carrier regulation of data roaming is inappropriate, because there is “no basis for a ‘legal compulsion’” under the *NARUC I* test.⁹⁷ AT&T continues, stating that “a legal compulsion is inappropriate where the market is functioning on its own.”⁹⁸ MetroPCS absolutely agrees with this general principle, but it has no bearing on the situation at hand. Here, there is substantial evidence that the market for data roaming is not properly “functioning on its own” in any respect. In addition, there are numerous additional public interest considerations that warrant a finding of common carrier treatment for data roaming.

“Consumers are becoming ever-more dependent on the use of wireless data, which continues to grow at an astonishing pace.”⁹⁹ AT&T’s own materials confirm that “Internet access is no longer a luxury but rather a necessity ... [and] has become an integral part of our daily lives.”¹⁰⁰ Yet, “since the largest carriers have consolidated the industry significantly through acquisitions, many roaming alternatives have vanished, which enables the large merged successors to flex their anticompetitive muscles.”¹⁰¹ As pointed out by T-Mobile, “[m]arket

⁹⁷ AT&T Comments 29.

⁹⁸ *Id.* 29.

⁹⁹ MetroPCS Comments 26; *Fourteenth Report* ¶¶ 181-184.

¹⁰⁰ AT&T Wireless, “AT&T Internet access options,” available at <http://www.wireless.att.com/learn/internet/index.jsp>.

¹⁰¹ MetroPCS Comments 26-27.

consolidation in the wireless industry has reduced the number of choices for data roaming partners and has exacerbated the market position of AT&T and Verizon.”¹⁰²

Exacerbating this diminishing number of potential roaming partners is the frequent refusal of large carriers, such as AT&T and Verizon Wireless, to engage in meaningful data roaming negotiations with small, rural and mid-tier carriers. In one instance, a mid-tier carrier “for over a year, [was] rebuffed by larger carriers with compatible networks whenever an automatic [data] roaming agreement [was] requested.”¹⁰³ By all indications, this was not an isolated experience. Bright House Networks “has indicated that it is unable to secure roaming agreements at reasonable and non-discriminatory rates,”¹⁰⁴ Leap Wireless has “increasingly encountered abusive and anticompetitive business practices, such as the largest carriers’ refusal to provide wholesale automatic roaming on just, reasonable, and non-discriminatory terms,”¹⁰⁵ and Cox Communications “has been unsuccessful negotiating data roaming arrangements with Verizon since August 2009 and ‘after eight months, the parties [had] yet to *begin* negotiating the provisions of [a] roaming agreement.’”¹⁰⁶ Because of this entirely unjustified delay on the part of Verizon Wireless in even commencing negotiations, “Cox concluded that its ‘experience defies Verizon’s characterization that it is “ready and willing” to negotiate in good faith.’”¹⁰⁷ This “market failure only promises to grow as small, rural and mid-tier carriers are forced to

¹⁰² T-Mobile Comments 7.

¹⁰³ *Ex Parte* Letter from David L. Nace, Counsel for Cellular South, to Marlene H. Dortch, Secretary, FCC, WT Docket nos. 06-150, 06-169, 96-86, and 05-265, PS Docket No. 06-229 (filed June 26, 2007), 3.

¹⁰⁴ Rural Cellular Association Comments 15.

¹⁰⁵ Cricket Communications Comments, WT Docket No. 09-66, 7 (filed Jun. 15, 2009).

¹⁰⁶ Rural Cellular Association Comments 15 (quoting Letter from Michael H. Pryor, Counsel to Cox Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-104, 2 (filed Apr. 28, 2010) (emphasis in original) (“*Pryor Letter*”)).

¹⁰⁷ Cellular South Comments 22 (quoting *Pryor Letter* 2).

decide whether or not to invest in next-generation broadband technologies, such as LTE.”¹⁰⁸

Leaving AT&T and Verizon Wireless aside, nearly every other commenter expressed a similar sentiment with respect to the public interest benefits of automatic data roaming.¹⁰⁹

In addition, even when roaming arrangements are reached, the rates being charged by the largest two national carriers effectively preclude their use. One commenter in this proceeding pointed out that a survey of their rural members found that roaming rates range from 30 cents a megabit to one dollar per megabit of mobile data usage.¹¹⁰ These rates make roaming data usage cost prohibitive since an average handset user may use several hundred megabits to over 1 gigabit of mobile data in a single month. Considering typical roaming patterns, at these rates, roaming charges could easily reach hundreds of dollars per month per subscriber. The prospect of charges of this magnitude effectively precludes the rural carriers from offering such service to its subscribers. Interestingly, these high per megabit data charges are being imposed at the same time that the costs to provide mobile data are dropping dramatically. At least one analyst concluded that the average retail rate per megabit of data on a home network is approximately one cent per megabit.¹¹¹ Yet, the large national carriers are proposing exorbitant roaming rates on a take it or leave it basis, thereby forcing the smaller rural carriers either to forego providing a national service or to subsidize the service by offering it at a competitive price that ends up being

¹⁰⁸ MetroPCS Comments 27.

¹⁰⁹ Leap Comments 4 (stating that “[a]utomatic data roaming also is essential to facilitate deployment of broadband to under-served communities, particularly low income and minority communities”); U.S. Cellular Comments 1 (finding that data roaming “will be vital to the customers of small and mid-sized wireless carriers and is essential to the survival of wireless competition”); Sprint Nextel Comments 9 (stating that “[a]n automatic data roaming obligation also would serve to advance the Commission’s underlying policy goal of expanding mobile broadband network deployment and competition”).

¹¹⁰ OPASTCO Comments 4.

¹¹¹ Bernstein Research, *U.S. Telecommunications and Global Telecom Equipment: The Wireless Data Exaflood*, 3 (Jun. 14, 2010).

below the rural carrier's actual costs and in some instances on a flat rate basis.¹¹² MetroPCS' experience with data roaming rates with one of the largest national carriers is similar to those of OPASTCO and NTCA's members. The ability of the largest national carriers to extract these significantly above cost rates from the least able carriers – the rural carriers – should be adequate reason for the Commission to find that the market for automatic data roaming is not working and step in and require that automatic data roaming be provided on a common carrier basis.

AT&T also argues that data roaming is not necessary since Wi-Fi capability now exists which will satisfy for the need for data roaming.¹¹³ While Wi-Fi hot spots have increased in number, by no means can the patchwork availability of such access points take the place of the ubiquitous wireless networks deployed by wireless carriers today. Also, while a Wi-Fi hot spot may allow data traffic to be off-loaded from a fixed location when the user is nearby, Wi-Fi hot spots do not provide mobility which has become the hallmark of wireless services.

AT&T further claims that the lack of data roaming is not impeding the deployment of advanced broadband services by wireless carriers.¹¹⁴ To support this, AT&T points to the fact that a number of carriers have deployed 3G broadband and some carriers, including MetroPCS, have decided to deploy 4G LTE.¹¹⁵ Of course, no one considers 3G services to be the goal of the *National Broadband Plan*. The *National Broadband Plan* seeks to have much higher speeds which are only available through 4G technology such as LTE. AT&T has proved to be unable to point to many carriers which have made the choice to deploy LTE. For example, AT&T points to Leap and US Cellular as carriers deploying advanced services, and yet those carriers have not

¹¹² OPASTCO Comments 4-5.

¹¹³ AT&T Comments 37.

¹¹⁴ *Id.* 49-50.

¹¹⁵ *Id.*

yet committed to building out 4G networks – they are only testing and evaluating their options. Furthermore, Verizon Wireless has undermined AT&T’s argument with its high profile promotional efforts to have rural carriers deploy 4G.¹¹⁶ If the rural carriers already had the incentive and the ability to deploy 4G, Verizon Wireless would not need to have set up a program to promote just such deployment.

The overwhelming number of comments support the conclusion that substantial public interest benefits will flow from an automatic data roaming obligation. Accordingly, contrary to AT&T’s unfounded assertion, the data roaming market is not “functioning on its own,” and in fact there is substantial evidence weighing in favor of a Commission finding of common carrier treatment of this service under *NARUC I*’s public interest prong.

The Commission also must extend data roaming to 4G services for another independent reason. As AT&T points out, “LTE 4G networks will carry both voice and data traffic over the same data network.”¹¹⁷ If the Commission fails to impose common carrier regulation on LTE 4G there is a distinct risk that deployment of LTE 4G will cause the largest national carriers to start denying interconnected data *and* voice roaming on the basis that such services are merely applications that run on the LTE 4G network and therefore are information services, not telecommunications services. Indeed, AT&T’s true intent is demonstrated by its argument that “the existence of VoIP applications or services that use the Internet does not make wireless broadband Internet access service itself an interconnected service.”¹¹⁸ If the Commission decides not to make data roaming a common carrier service, it should expect that interconnected

¹¹⁶ MetroPCS Comments 25; *see* “LTE in Rural America,” <http://aboutus.vzw.com/rural/Overview.html>.

¹¹⁷ AT&T Comments 66.

¹¹⁸ *Id.* 15-16.

voice and data roaming become extinct like the dodo bird over time as networks are replaced with LTE 4G.

VI. THE CARRIER-TO-CARRIER TRANSMISSION COMPONENT OF DATA ROAMING IS NOT AN INFORMATION SERVICE

Both AT&T and Verizon Wireless claim that data roaming is an information service, and therefore cannot be regulated under Title II.¹¹⁹ Each carrier sets forth different rationales for why data roaming is properly regulated as an information service, none of which stand up to even passing scrutiny. Whether the Commission views data roaming as a wholesale, carrier-to-carrier transmission service (as MetroPCS and AT&T believe it to be), or as a severable transmission component of the data roaming service provided to an end-user mobile Internet customer, in either case, the transmission is a separate telecommunications service properly regulated as a common carrier service under Title II.

A. Storage of Customer Authentication Data is Not Sufficient To Transform a Telecommunications Service Into an Information Service

AT&T argues that the basic customer authentication process that accompanies all roaming sessions, whether data or voice, is sufficient to transform the wholesale, carrier-to-carrier telecommunications/transmission component of a data roaming session into an information service.¹²⁰ But, the mere fact that AT&T stores customer authentication information for 24 hours after a roaming call does nothing to alter the essential character of the transmission itself, and does not transform it from a telecommunications service, into an information service. Customer authentication profiles also are stored in connection with voice roaming sessions, and

¹¹⁹ AT&T Comments 26-28; Verizon Wireless Comments 24-27.

¹²⁰ AT&T Comments 27. For example, AT&T states that by opening a “customer profile” that is stored on its system for 24 hours, it is somehow providing an information service via this storage. Never mind that this information is not requested by, or stored for the use of, the end-user roaming customer.

the Commission has never found this to transform voice roaming into an information service. In fact, the Commission has reached just the opposite of this absurd conclusion, finding that voice roaming is a CMRS service and subject to common carrier regulation.¹²¹ Furthermore, AT&T ignores the explicit exception in the definition for information services which exempts out “any use of such capability [for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making information available] for the management, control, or operation of a telecommunication system or the management of a telecommunications service.”¹²² Any registration or authentication process for a telecommunications service (which is the transmission component of data roaming) would clearly be for the management, control or operation of a telecommunication system or for the management of a telecommunication service. Indeed, without such authentication process, the Roaming Partner would not be able to provide the transmission component of data roaming.

B. Data Roaming Must Be Regulated Consistently, Regardless of Technical Configuration

For its part, Verizon Wireless argues that, based on the manner in which certain data roaming calls are handled, data roaming should be regulated as an information service.¹²³ Verizon Wireless seeks comfort in the fact that, under certain circumstances, “the roaming [mobile subscriber] may directly access application servers in the visited network without tunneling to the home operator's network.”¹²⁴ However, Verizon Wireless also admits that such

¹²¹ See *2007 Roaming Order*.

¹²² 47 U.S.C. Section 153(20).

¹²³ Verizon Wireless Comments 26.

¹²⁴ *Id.* 26 (quoting “Wireless Data Roaming Requirements and Implementation,” CDG Document 79, Version 1.2, April 26, 2007, Section 4.1, p.9).

a configuration is not required, nor is it even predominant in the wireless industry.¹²⁵ The mere statement that “carriers can and do use” protocols that allow direct access to the Internet by the roaming customer without being referred back through the Home Network is insufficient to avoid common carrier treatment. MetroPCS detailed the typical data roaming configuration of a CDMA provider, which is similar to other air interface standards in the industry.¹²⁶ Simply because a carrier can design a data roaming setup that may avoid proper regulation under Title II, does not mean the Commission should allow such a carrier to evade regulation by doing so. Indeed, the Commission strives for consistency of regulation of like services to avoid arbitrage opportunities.¹²⁷

Indeed, AT&T attempted a similar regulatory two-step back in 2002, when it filed a petition for declaratory ruling with the Commission that its phone-to-phone Internet protocol (IP) telephony services should be exempt from the access charges regime applicable to circuit-switched interexchange calls. The Commission determined in the resulting *AT&T Declaratory Ruling* that, since the service provided by AT&T “undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider’s use of IP technology,” it should remain classified as a telecommunications service, and thus be subject to access

¹²⁵ Verizon Wireless Comments 26 (noting that other setups “enable the mobile subscriber to obtain Internet access and access applications provided through the home carrier network”). Indeed, as MetroPCS understands it, such a capability may be an alternative for future technologies, such as LTE, but not for 2.5/3G data roaming.

¹²⁶ MetroPCS Comments 8-17.

¹²⁷ *Petition for Declaratory Ruling That AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd 7457, ¶ 24 (2004) (finding that even where a call would “utilize AT&T’s Internet backbone for IP transport, and is converted back from IP format before being terminated at a LEC switch” the call was still a telecommunications service) (*AT&T Declaratory Ruling*).

charges.¹²⁸ The Commission held that “[e]nd-user customers do not order a different service, pay different rates, or place and receive calls any differently [with AT&T’s IP service] than they do through AT&T’s traditional circuit-switched long distance service; the decision to use its Internet backbone to route certain calls is made internally by AT&T.”¹²⁹ Consequently, the Commission looked past the mechanics of how the AT&T IP calls were routed in order to assess the appropriate regulatory treatment. In the present situation, end-users, whether they be the wholesale purchasing carrier or the roaming end-user consumer, see no difference in service, pay no different rates, and certainly receive no enhanced functionality with regard to the way AT&T or Verizon Wireless make their internal network setup decisions. As in the *AT&T Declaratory Ruling*, MetroPCS agrees with the Commission’s determination that “[w]e do not believe that a service . . . which provides no enhanced functionality to the end user due to the conversion to IP – is the kind of use of the ‘Internet or interactive services’ that Congress sought to single out for exceptional treatment.”¹³⁰

The Commission should not encourage licensees to “game the system” by setting up data roaming configurations merely to avoid regulation. Any such approach would foster unnecessary litigation as carriers attempt to prove to the Commission why their particular data roaming method is not subject to automatic roaming. Verizon Wireless contends that because data roaming can provide direct Internet access through the Roaming Partner, no manner of data roaming should be subject to regulation. MetroPCS believes just the opposite – instances where one configuration is properly regulated, while another configuration may not be, call for consistent regulation of the like services. Unless the Commission desires to devote its precious

¹²⁸ *Id.* ¶ 1.

¹²⁹ *Id.* ¶ 12.

¹³⁰ *Id.* ¶ 17.

resources to untangling complicated, esoteric and entirely unnecessary data roaming configurations designed to escape regulation, it should find that all such configurations must be subject to the same requirements.¹³¹

C. The Provision of a DNS Lookup Service Does Not Transform the Telecommunications Component of a Transmission Service Into an Information Service

In support of its argument that wireless data roaming is an information service, AT&T states that it “performs a DNS lookup that translates the alphanumeric APN into an IP address.”¹³² MetroPCS agrees that under some configurations, the Roaming Partner may provide Domain Name System or DNS services. However, this provision of DNS services is an insubstantial component of the overall data roaming service that is being purchased by the Home Carrier. DNS is akin to the routine call routing translations and functions that occur in every telecommunication call and that never have been deemed to convert the calls into information services. Similarly, the mere provision of a DNS lookup service should not be deemed sufficient to convert the telecommunications/transmission service provided by the Roaming Partner into an information service.

DNS refers to the process of translating Internet domain names (which are alphabetically based) into IP addresses (which are numerically based). Further, just like the authentication functions provided by the Roaming Partner, the address translation provided by DNS fits clearly within the statutory exception to information services. In order to provide any

¹³¹ Even if the Commission agreed that certain configurations of data roaming may be treated as an information service, the Commission at a minimum must mandate that the configurations that are telecommunications services be offered on a common carrier basis. In that way, the Home Carrier will always have the choice of receiving data roaming. If the Home Carrier decides that the alternative configuration provides additional benefits, the parties could be free to negotiate appropriate arrangements under those circumstances.

¹³² AT&T Comments 27.

telecommunications service, the input from the user needs to be translated into the physical address used to route the telecommunications to its ultimate destination. Here, DNS is merely performing the same functions that the SS7 system performs in connection with an ordinary voice call. The fact that DNS converts an address from www.myspace.com to 192.168.0.1 does not make it any less a part of the management and control of a telecommunications system or the management of a telecommunications service than does the translation of punched DTMF digits into the line codes necessary to switch a call in the wireline network.¹³³ These routine overhead routing and translation functions never have been deemed to convert a communication from a telecommunications service to an information service.¹³⁴ Similarly, there is no reason that the cursory DNS translation service provided by a Roaming Partner should be considered sufficient to transform the transmission component of a data roaming session (which clearly is a telecommunications service) into an information service.

VII. THERE CAN BE NO SERIOUS ARGUMENT THAT AUTOMATIC DATA ROAMING CONSTITUTES A PHYSICAL OR REGULATORY TAKING

Verizon Wireless argues that, if the Commission imposes an automatic data roaming obligation on wireless carriers, it risks a constitutional challenge based on the Takings Clause. Specifically, Verizon Wireless states that “[i]mposing data roaming obligations on existing

¹³³ Although the Commission previously has found that DNS was an information service process, that determination was in the context of a broadband service which included not only the provision of DNS, but also other integrated information services, such as e-mail, USENET, etc. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶ 38 (2002). In contrast, the service being provided here by the Roaming Partner is clearly a transmission service only, which qualifies as a telecommunications service.

¹³⁴ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 33, 52 (1998).

licenses would effect a physical taking” and that “[a]n automatic data roaming obligation ... would also effect a regulatory taking.”¹³⁵ Neither argument withstands scrutiny.

Verizon Wireless’ argument that the Commission lacks the authority to adopt automatic data roaming rules because “the Act does not provide express statutory authority to impose data roaming rules on existing licenses” is simply incorrect. As MetroPCS and others have shown, the wholesale, carrier-to-carrier transmission service provided in connection with data roaming clearly is telecommunications, and the manner in which they are provided constitutes a telecommunications service. Because this data roaming transmission service is a telecommunications service, the Commission has the express statutory authority – and in fact the obligation – to regulate it under Title II. Thus, Verizon Wireless’ argument that the Commission somehow lacks the authority to regulate what are clearly common carrier telecommunications service offerings is without merit.

To start, data roaming in no way constitutes a “permanent physical occupation” of real property, and does not destroy the value of that property. The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land.¹³⁶ Here, Verizon Wireless is voluntarily providing mobile wireless services and wireless data roaming services over their networks, and is not required to continue to do so by the Commission. Verizon Wireless would be welcome to offer other services using its network infrastructure, at which point it would no longer be subject to automatic data roaming obligations.

¹³⁵ Verizon Wireless Comments 43, 46.

¹³⁶ *Yee v. Escondido*, 503 U.S. 519, 532 (1992) (finding that a physical taking did not occur where an ordinance did not “authorize an unwanted physical occupation of petitioners’ property. It is a regulation of petitioners’ *use* of their property, and thus does not amount to a *per se* taking”) (emphasis in original).

Data roaming does not constitute a “regulatory taking,” either. There is no merit to the argument that the Commission has regulated AT&T’s and Verizon Wireless’ networks to the point that it has taken away all practical uses of the property.¹³⁷ As noted above, the networks of these two large, nationwide providers have substantial value, and would continue to have substantial value even if automatic data roaming rights were granted to call carriers. Verizon Wireless retains the ability to continue to make valuable use of its physical network by providing mobile wireless services to its own users, and also could transform its network to other productive uses if it so chose. Moreover, providers of data roaming are not being asked to provide service for free; indeed, they merely have to provide service on just and reasonable rates, terms and conditions. Verizon Wireless is, in many circumstances, offering data roaming at unreasonable rates. Legal precedent dictates that, because this offer has been made at any rate, the move to a regulated “reasonable rate” will not constitute a regulatory taking.¹³⁸

Finally, Verizon Wireless argues that carriers “expended tremendous sums ... on spectrum licenses and development on the understanding that their licenses allowed them to make data roaming arrangements free from common carriage obligations.”¹³⁹ This argument is nonsense. The Commission has never explicitly indicated that the functions performed when a carrier is providing data roaming is or is not a telecommunications service. To the contrary, the Commission has issued repeated notices seeking comment on whether data roaming should be required. Thus, they were on notice that this was an open issue and that data roaming obligations

¹³⁷ *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 322 (1987) (finding a taking where an ordinance “denied appellant all use of its property for a considerable period of years”) (emphasis supplied).

¹³⁸ *Yee*, 503 U.S. at 539 (stating that “no taking occurs ... when a tenant invited to lease at one rent remains at a lower regulated rent”).

¹³⁹ Verizon Wireless Comments 46.

could ultimately apply. Moreover, since the functions performed by the Roaming Partner are telecommunications services and functionally equivalent to CMRS, Verizon Wireless and AT&T as sophisticated integrated telecommunications providers should have known that they would be required to provide such service to other carriers. To argue now that they spent billions of dollars on the belief that they would never have to provide any telecommunications service pursuant to Title II is just not sustainable. Further, no matter the manner in which these licenses were paid for or acquired, these licenses are not the property of the carrier, but rather a public resource. Since the very concept of spectrum licensing arose, “the licensee’s role developed in terms of a ‘public trustee’”¹⁴⁰ and with that public trusteeship came notion that licensees are “are temporary permittees – fiduciaries – of a great public resource and they must meet the highest standards which are embraced in the public interest concept.”¹⁴¹ When a licensee, such as Verizon Wireless, accepts the trusteeship that comes along with holding spectrum licenses, it also must “accept[] that [the] franchise ... is burdened by enforceable public obligations,”¹⁴² such as any common carrier automatic data roaming obligations that the Commission may find.

VIII. COMMON CARRIER REGULATION OF DATA ROAMING CERTAINLY WOULD NOT DISCOURAGE INVESTMENT AND INNOVATION – RATHER, IT WOULD PROMOTE COMPETITION IN THE MOBILE WIRELESS INDUSTRY

Both AT&T and Verizon Wireless also rehash prior arguments they previously made about voice roaming –that investment and innovation will be discouraged, and that competition will be harmed. As demonstrated previously by MetroPCS, each of these arguments has been

¹⁴⁰ *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 114 (1973).

¹⁴¹ *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969).

¹⁴² *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966).

disproven, and the consequences of not having automatic data roaming regulated as a common carrier service may cause great harm to the goals set forth in the *National Broadband Plan*. In the *National Broadband Plan* itself, the Commission recognized the importance of data roaming, noting that “[d]ata roaming is important to entry and competition from mobile broadband services and would enable customers to obtain access to e-mail, the Internet and other mobile broadband services outside the geographic regions served by their providers.”¹⁴³

It is curious that AT&T would suggest that consumers would be harmed by automatic data roaming. Indeed, AT&T repeatedly states throughout its comments the importance of mobile broadband and how consumers expect their devices to work nationwide. If AT&T truly was concerned about all consumers being able to access their mobile devices nationwide, it would drop its opposition to data roaming on just and reasonable terms. Data roaming is a necessity in order for new entrants and small, rural and mid-sized carriers to have sufficient incentive to invest in new broadband technologies.¹⁴⁴ If a customer is unable to receive data when roaming outside of the home market of a non-nationwide carrier, it is unlikely the customer will buy broadband service from that carrier, even if the carrier provides competitive coverage in the local market. This simple restriction will deter new entrants and small, rural and mid-sized carriers from investing in broadband at the exact time such investment is sorely needed to meet the objectives of the *National Broadband Plan*, and to help the United States pull itself out of the worst recession since the Great Depression.¹⁴⁵ The only way to ensure that broadband

¹⁴³ *National Broadband Plan* 49.

¹⁴⁴ *Id.* 35 (calling data roaming “crucial for enabling competition in the small business and enterprise customer segments, in mobile services and in deployment of services in high-cost areas”).

¹⁴⁵ *Id.* 49 (noting that “[f]ew, if any, [wireless] networks will provide ubiquitous nationwide service entirely through their own facilities, particularly in the initial stages of construction and in rural areas”).

investment will occur is to enable all carriers to offer their customers the ability to roam and use these data services, which would allow carriers to recoup their investment in broadband technology.¹⁴⁶ Allowing data roaming on just and reasonable terms would allow for more competition in the broadband market, which would ultimately benefit consumers. This would be just the low-hanging fruit the Commission needs to reach ubiquitous broadband coverage.

Moreover, the Commission bias in favor of facility-based competition – with which MetroPCS agrees – should not be misconstrued to mean that the public interest will be best served if every licensed carrier builds out every inch of territory licensed to it. Some market areas are so sparsely populated that they cannot economically support another network. Although the introduction of the second, third or fourth facility-based competitor may have public interest benefits, the arrival of the fifth or sixth carrier may indeed present diminishing returns, particularly in a sparsely populated area that will not support the investment. At some point, there is a wasteful duplication of facilities that can be detrimental to all consumers who are forced to pay for such inefficiency.¹⁴⁷

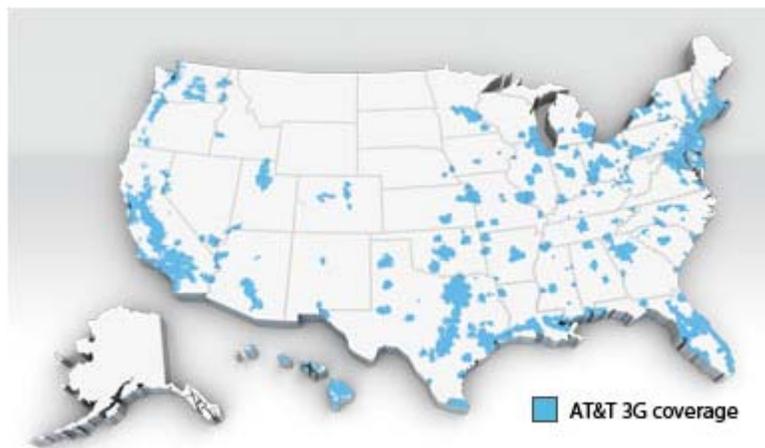
Some carriers have specialized business plans that serve niche audiences and are not well-suited to all market areas. The Commission’s policies should foster a variety of business plans and encourage new entrants to develop innovative services for niche markets. Penalizing specialized carriers by denying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

¹⁴⁶ *Id.* (finding that “[i]n order for consumers to be able to use mobile broadband services when traveling to areas outside their provider’s network, their provider likely will need to enter into roaming arrangements with other providers”).

¹⁴⁷ MetroPCS conducts demographic and competitive market analyses before it enters an auction and does not seek to acquire licenses which will not support an additional carrier.

Furthermore, as MetroPCS pointed out in its Comments, significant portions of the networks in territories where Verizon Wireless and AT&T claim their competitive advantage were constructed using universal service funds.¹⁴⁸ AT&T and Verizon Wireless (or their predecessor licensees) accepted public funds to build out areas that they otherwise would not have built out. It is now disingenuous to suggest that the same end user customers who have had to contribute for years to the universal service funds, who paid for these very sites, would not have the ability to access these very sites when they are roaming.

One thing is clear: no carrier covers all of the area it is licensed to serve. For instance, as anyone with a television or an iPhone knows, while AT&T holds licenses that cover virtually the entire U.S., AT&T's 3G coverage is not nationwide. Indeed, the map prominently featured in the Verizon "there is a map for that" ads demonstrates that there are vast areas of the country for which AT&T has not built-out 3G facilities.¹⁴⁹



¹⁴⁸ MetroPCS Comments 47-48.

¹⁴⁹ See <http://phones.verizonwireless.com/3g/imgs/attmap.jpg>. In a recent advertisement, AT&T admits that its 3G coverage is only available to approximately 230 million pops. See AT&T advertisement at 8:30 Central, WDFW, Fox.

Clearly, AT&T has sufficient spectrum to build out its 3G network. A study by consulting firm Arthur D. Little says AT&T has a national average of roughly 96 MHz of spectrum.¹⁵⁰ For example, AT&T (as Cingular AWS, LLC) spent over \$1.3 billion in Auction No. 66 on spectrum covering nearly 200 million people,¹⁵¹ and spent over \$6.5 billion in the 700 MHz auction.¹⁵² It is hard to believe that AT&T argues that it is unable to provide the bandwidth to allow for data roaming, while many MHz of spectrum sits unused in both AT&T's and Verizon Wireless' warehouses. Obviously, the absence of data roaming rights is not discouraging AT&T from building out its 3G network. So, there must be some other reason that has caused AT&T not to build-out its 3G network nationwide even though it has sufficient spectrum to do so. It is absurd to suggest that facilities-based competition be carried on the back of the smallest carriers when the largest ones do not provide ubiquitous coverage, even though they have the spectrum and resources to do so.

AT&T and Verizon Wireless purchased approximately \$16 of the \$19 billion dollars worth of spectrum sold in Auction No. 73. Their vast spectrum resources dwarf the resources of smaller carriers, such as MetroPCS, which is building out its 4G LTE network on as little as 10 MHz in certain markets. In fact, this massive quantity of unused spectrum is just the sort of "head start" that AT&T claims it does not have.¹⁵³ With no spectrum auctions currently planned, MetroPCS, and other small, medium and rural carrier's 3G and 4G customers, should not be restricted to using mobile Internet services only in their home markets. Rather, the Commission

¹⁵⁰ "FCC Planning to Wrest TV Spectrum for Mobile Broadband," Yahoo.com (Dec. 23, 2009) available at http://news.yahoo.com/s/ibd/20091223/bs_ibd_ibd/20091223tech.

¹⁵¹ See Top Bidders, FCC Auction, Summary, Auction 66, available at http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=66.

¹⁵² "Auction of 700 MHz Band Licenses Closes," Public Notice, DA 08-595 (Mar. 20, 2008), available at <http://wireless.fcc.gov/auctions/default.htm?job=release&id=72&y=2008>.

¹⁵³ AT&T Comments 52.

should take this opportunity to allow for robust nationwide competition for mobile broadband services right out of the box, and make such services available to all consumers.

Finally, AT&T makes the claim that if the Commission does adopt an automatic data roaming right, it should not do so on the same terms as automatic voice roaming, because data roaming is somehow different.¹⁵⁴ As MetroPCS repeatedly has shown throughout, the process by which data roaming occurs is nearly identical to the process by which voice roaming occurs, and the two wholesale services are functional equivalents of one another. As such, data roaming must be subject to the same regulatory treatment as voice roaming,¹⁵⁵ and extended from all carriers to all carriers, where technically feasible.

AT&T makes much ado about the congestion on its own network that would be caused by a requirement that it provide data roaming. This is a red herring. First, while data services may consume more capacity than voice services, AT&T has not shown by any means that providing roaming to third parties will cause its networks further measurable congestion. And, no such showing can be made. AT&T and Verizon together have over 60 percent of all wireless subscribers.¹⁵⁶ This means that, at most, the universe of additional subscribers who might roam on AT&T's networks at most would be the remaining 40 percent. If these roaming customers were split between AT&T and Verizon, at most each network would only have an additional 20 percent of the seeking to use its respective networks. Traditionally, a customer will not utilize more than 10-20 percent of its monthly minutes while roaming, so this 20 percent customer base

¹⁵⁴ *Id.* 55.

¹⁵⁵ *Implementation of Section 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, ¶ 69 (1994) (noting that the Commission's goal is to create an "enduring regulatory regime under which substantially similar services are subject to symmetrical regulation").

¹⁵⁶ MetroPCS Comments 24; *supra* n.92.

would represent no more than a 2-4 percent increase in roaming traffic over AT&T's entire network. This is an insubstantial amount of additional traffic.

Second, AT&T at the same time it is arguing that data roaming will congest its network, it claims that data roaming is already ubiquitously available for 2.5G.¹⁵⁷ Moreover, Verizon Wireless claims that one-third of all its roaming partners already have data roaming arrangements and one-third have not requested data roaming arrangements.¹⁵⁸ Based on these arguments, any increase in congestion caused by data roaming services to those who do not have it today would be minimal.

Third, a data roaming obligation may still permit the Roaming Partner to manage congestion on its network. However, the management techniques suggested by AT&T would be discriminatory. AT&T proposes that the Roaming Partner be allowed to manage the roaming traffic by giving it lower priority in order to prevent its own data traffic from being degraded.¹⁵⁹ While MetroPCS understands that a carrier may need at times to drop customers down in speed from 4G to 3G or 2.5G, any such network management technique should be implemented so as to not discriminate against roaming traffic. This would ensure that all customers in the market (both those of the Roaming Partner and those of the Home Carrier) will be receiving service on a first-come, first-serve basis and that roaming customers will not become second class citizens on Roaming Partner networks.

Fourth, AT&T also argues that requiring data roaming would create a perverse form of discrimination because, depending upon the services offered by the Home Carrier, the roaming customers might be able to use the Roaming Partner's service differently than the Roaming

¹⁵⁷ AT&T Comments 37, 54.

¹⁵⁸ Verizon Wireless Comments 7-8.

¹⁵⁹ AT&T Comments 10, 61-62.

Partner's own customers.¹⁶⁰ This too is a red herring. The Roaming Partner may charge just and reasonable rates for any roaming service it provides (which includes recovering its costs plus a reasonable profit). To the extent that a Roaming Carrier has designed its own rate plans in a way to limit usage, it could impose similar limitations on a non-discriminatory basis upon roamers. The only thing that the Roaming Partner could not do is limit roaming use by customers of the Home Carrier while allowing rate plans with unlimited use to its own customers. Finally, AT&T complains that in order avoid congestion it would be required to build additional capacity in its networks.¹⁶¹ This argument misses the point since AT&T will be receiving compensation (in many cases above the rates it charges its own customers to use the service), thereby enabling it to build additional capacity in order to be able to sell such capacity to roaming customers. The only reason it might not have these incentives is if the carrier wants to act anticompetitively and exploit its dominant market position. This the Commission should not allow. The simple fact is that, since the Roaming Partner will be paid for its services, it has the same incentives to provide additional capacity as it does to provide services to its own customers.

IX. CONCLUSION

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

¹⁶⁰ *Id.* 40.

¹⁶¹ *Id.* 46.

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