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November 9, 2010

Via Electronic Delivery

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, D.C. 20554

**Re: Notice of *Ex Parte*
Reexamination of Roaming Obligations of CMRS Providers
WT Docket No. 05-265**

Dear Ms. Dortch:

The Rural Telecommunications Group, Inc. (“RTG”) submits this letter in response to a recent *ex parte* filing by AT&T Services, Inc. (“AT&T”) in which AT&T argues that data roaming is not a commercial mobile radio service (“CMRS”) subject to common carrier obligations. While AT&T references the comments and reply comments of many parties to this proceeding¹, this letter addresses solely AT&T’s response to arguments made by RTG earlier in this proceeding.

AT&T first argues that data roaming must only be treated as a private mobile service (“PMS”) and not as CMRS (or the functional equivalent of CMRS). AT&T bases this argument on its belief that little evidence exists to support the premise that mobile data is a close economic substitute for voice services which are classified as CMRS. Next, AT&T argues that data roaming does not qualify as a “hybrid” service of CMRS under the plain meaning of 47 C.F.R. §20.9(a) (“Rule 20.9”). AT&T circularly argues that because it allegedly does not qualify under the statutory definition of CMRS under Section 332 of the Communications Act, it cannot fall within Rule 20.9’s definition of CMRS by virtue of it being a hybrid service. Below, RTG demonstrates that not only is data roaming the functional equivalent of CMRS but that given its interdependency with voice roaming it also meets the definition of a CMRS “hybrid service.”

¹ Letter of Michael Goggin to Marlene H. Dortch, Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265 (filed September 22, 2010) (“*AT&T Ex Parte*”).

Data Roaming is the Functional Equivalent of CMRS

AT&T concedes that if a mobile service does not meet the statutory definition of CMRS, then it must either be PMS or the “functional equivalent” of CMRS. Furthermore, AT&T references “the Commission’s precedents...which necessarily establish a stringent standard for determining whether a service is the ‘functional equivalent’ of a CMRS service.”² While AT&T does in fact cite Federal Communications Commission (“FCC” or “Commission”) precedent set forth in the *Second Report and Order*³, it completely neglects the functional equivalency test spelled out in the *Second Report and Order*.⁴ Specifically, the Commission states that it “will evaluate a variety of factors in deciding whether the service under review is the functional equivalent of a commercial mobile radio service” and that its “principal inquiry will involve evaluating consumer demand for the service in order to determine whether the service is a close substitute for CMRS.”⁵ Examples of such demand include (a) market research information identifying the targeted market for the service, and (b) changes in price prompting customers to shift from one service to the other.

When applying the functional equivalency test spelled out in the *Second Report and Order* data roaming easily becomes a close economic substitute of voice roaming which is unequivocally CMRS. Additionally, whether the substitutability of one service for the other is viewed in the retail sense (i.e. whether end users/consumers make economic decisions about choosing one service to replace the other) or whether it is viewed in the wholesale sense (i.e. whether mobile carriers choose to replace some of their voice roaming traffic with data roaming traffic) is irrelevant. In both instances they are economic substitutes for performing the same function, that is to say, the simple act of communicating among individuals.

Economic substitutability is most evident today primarily because mobile consumers in the United States have embraced mobile data services, in particular texting, instant messages (“IM”), mobile e-mail, social networking, mobile gaming, mobile Internet access, multi-media messaging and streaming video as a viable and preferable substitute to voice calling because the pricing of those data services have matched or fallen below voice services. On numerous occasions in the recent past AT&T has admitted that these consumer-wide shifts from voice to data have become a reality:

“[C]ustomers in the U.S. are increasingly relying on wireless broadband for email, web surfing, social networking, e-commerce, and other functions that have historically been available only from wireline broadband services.”⁶

² *AT&T Ex Parte* at 5.

³ *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Service*, Second Report and Order, GN Docket No. 93-252, FCC 94-31 (released March 7, 1994) (“*Second Report and Order*”) at ¶ 79.

⁴ *Second Report and Order* at ¶ 80.

⁵ *Supra*.

⁶ *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless Including Commercial Mobile Services*, Comments of AT&T Inc., WT Docket No. 09-66 (filed September 30, 2009) (“*Comments of AT&T Inc.*”) at p 25.

“Many consumers use their wireless services and devices for both voice and data – not just as part of the same plan but as part of the *same communication* (as when a consumer elects not to leave a voicemail and sends a text instead, or sends a text or e-mail instead of making a call in the first place.” That trend will only continue, as advances in network innovation permit consumers to email, text, browse the web, or even share live video from their location while simultaneously holding a voice conversation using the same device. In view of these marketplace realities, *it makes little sense to define and investigate “voice” and “data” as separate markets.*” (emphasis added)⁷

Furthermore, AT&T concedes that these shifts to voice alternatives are because of consumer price sensitivity:

“Carriers likewise have been introducing innovative rate plans for text messaging, including flat-rate plans, with the result that the amount consumers pay for text messaging has been plummeting, while usage increases dramatically.”⁸

“More fundamentally, the vast majority of text messages transmitted by large carriers are sent under one of their plans offering a fixed number of (or unlimited) messages. Indeed, more than 99% of the messages that AT&T customers send and receive are under fixed-rate pricing plans. The price per message in these pricing plans is just over a penny, not 20 cents. And those per-message prices have been plummeting: AT&T’s prices were about three times higher in 2007 (about 4.3 cents per message) than they are today (1.4 cents per message).”⁹

Industry data not only confirms that non-voice communication mediums such as texting and IMing are clear economic substitutes for voice traffic, but the current demographic breakdown of U.S. mobile consumers strongly suggests that texting and IMing are preferred means of person-to-person communications among teens and young adults. In fact, according to a recent Nielsen study, “[t]exting is currently the centerpiece of mobile teen behavior” and “43 percent claim that it is their primary reason for getting a cellphone, which explains why QWERTY input is the first thing they look for [in] choosing their devices.”¹⁰

As American consumers increasingly shift to mobile data products offered via smartphones, AT&T has become a direct beneficiary of this economic substitution. In Q2 of 2009, only 16 percent of mobile users had smartphones. One year later, one in four Americans

⁷ *Supra* at p 21.

⁸ *In the Matter of Wireless Telecommunications Bureau Seeks Comment on Commercial Mobile Radio Services Market Competition*, Reply Comments of AT&T Inc., WT Docket No. 09-66 (filed July 13, 2009) (“*Reply Comments of AT&T Inc.*”) at pp 18-19.

⁹ *Reply Comments of AT&T Inc.* at pp 21-22.

¹⁰ “US Teen Mobile Report: Calling Yesterday, Texting Today, Using Apps Tomorrow” (released October 18, 2010) (http://blog.nielsen.com/nielsenwire/online_mobile/u-s-teen-mobile-report-calling-yesterday-texting-today-using-apps-tomorrow/).

owned a smartphone.¹¹ Just three months later, that figure is now at 28 percent.¹² Approximately 60 million Americans use a smartphone today.¹³ With this explosive rate of technology adoption, the question is not *if* all U.S. mobile consumers will permanently migrate to smartphones but *when*? In fact, nearly one-third of AT&T's post-paid subscribers already use an integrated device and twice as many smartphone users have chosen AT&T over any other U.S. carrier.¹⁴ Smartphones will soon be the primary device by which Americans communicate, and they will use them to text, IM, e-mail and make VoIP phone calls. To completely shut off mobile roamers from accessing these services, especially in a climate where AT&T (and Verizon) is reticent to offer 3G and 4G roaming, is both anti-competitive and contrary to the public interest. Voice roaming and data roaming are clear economic substitutes and should be recognized as such by the Commission.

Economic substitution also occurs in the replacement of traditional circuit-switched voice traffic with packet-switched voice applications. There is a general consensus that as mobile network operators fully migrate to IP-based 3G and eventually 4G (predominantly LTE) networks, those networks will serve as the sole backbone for both voice and data usage. Likewise, mobile Voice-over Internet-Protocol (VoIP) is destined to be the primary carrier of voice traffic going forward. Industry analysts predict that mobile VoIP users will exceed 100 million people by the year 2012 and that "there is a direct correlation between 3G roll out and the take up of mobile VoIP."¹⁵ In the eyes of the consumer, the two are completely interchangeable. To determine whether mobile VoIP is the functional equivalent of traditional circuit-switched voice now turns on whether changes in pricing influences whether consumers abandon one and take up the other. The easiest way to apply this test in a retail roaming situation is to assume that if the price of voice roaming increases (whether as a surcharge or through an increase in overall voice pricing) but data roaming that supports VoIP stays level, would consumers substitute one for the other? Just as millions of Americans have eschewed voice calling for texting, IMing, and e-mailing as a means of communicating with others, under any rationale those same consumers would also be willing to shift the remainder of their voice traffic to mobile VoIP if the alternative was to pay more for how voice calls are handled today. Therefore, if data roaming is viewed in the context of it being a retail service, then it is without doubt the functional equivalent and clear economic substitute of voice roaming.

¹¹ "Android Soars, but iPhone Still Most Desired as Smartphones Grab 25% of U.S. Mobile Market" (released August 2, 2010) (http://blog.nielsen.com/nielsenwire/online_mobile/android-soars-but-iphone-still-most-desired-as-smartphones-grab-25-of-u-s-mobile-market/).

¹² "Mobile Snapshot: Smartphones Now 28% of U.S. Cellphone Market" (released November 1, 2010) (http://blog.nielsen.com/nielsenwire/online_mobile/mobile-snapshot-smartphones-now-28-of-u-s-cellphone-market/).

¹³ Press Release: "comScore Reports September 2010 U.S. Mobile Subscriber Market Share" (released November 3, 2010) ([http://www.comscore.com/Press Events/Press Releases/2010/11/comScore Reports September 2010 U.S. Mobile Subscriber Market Share](http://www.comscore.com/Press%20Events/Press%20Releases/2010/11/comScore%20Reports%20September%202010%20U.S.%20Mobile%20Subscriber%20Market%20Share)).

¹⁴ "AT&T Leads the U.S. in Smartphones and Integrated Devices" (released May 15, 2010) (<http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26819>).

¹⁵ Press Release, Juniper Research, May 27, 2010 (<http://www.juniperresearch.com/viewpressrelease.php?pr=187>).

Data roaming is also the functional equivalent of voice roaming when the service is viewed purely as a wholesale transaction between two mobile operators. In this case, the determination of substitutability is a business determination made by the visiting mobile operator when paying for roaming services on the serving mobile operator. For example, if a mobile operator was faced with an increase in wholesale voice roaming rates with a particular roaming partner, but that same roaming partner also offered data roaming, the visiting operator would happily welcome a shift in traffic from voice usage to texting, IMing and mobile VoIP, especially if the wholesale cost of that “data usage” is significantly smaller based on the data roaming rates. Put differently, texting, IMing and mobile VoIP traffic is dwarfed by other data uses (e.g., streaming video) in terms of bandwidth and volume, and if the wholesale cost for the equivalent service in voice roaming were to increase, a visiting mobile operator would gladly replace traditional mobile voice roaming with texting, IMing and mobile VoIP while roaming. Conventional wisdom suggests that the only thing holding back many mobile operators today from completely embracing alternative communications mediums like IMing and email and mobile VoIP is that there is no guarantee for nationwide coverage *precisely because AT&T and Verizon are unwilling to enter into 3G and 4G data roaming agreements*, and these two operators are indispensable if a company is to advertise truly nationwide coverage. Therefore, when viewed purely as a carrier-to-carrier wholesale service, voice roaming and data roaming are functional equivalents because they effectuate the same result to the target market and changes in price will prompt the customer to shift from one option to the other.

Data Roaming is a Hybrid Service under Rule 20.9

In its reply comments, RTG carefully recited the history of Section 332(d) of the Communications Act and Congress’ intent to give the Commission the flexibility to specify, by regulation, what is CMRS and what is PMS.¹⁶ After Section 332(d) was enacted, the Commission did just that for CMRS in Rule 20.9¹⁷ and for PMS in Rule 20.3.¹⁸ In Rule 20.9, the Commission defined CMRS as, among other things, a “hybrid service.” In its *ex parte*, AT&T argues in circular fashion that data roaming is not a “hybrid service” because it is not CMRS arguing that data roaming does not meet the statutory definition of commercial mobile radio service fails to address the relevant issue, namely, whether data roaming is a hybrid service (if so, *by definition* it is CMRS).

AT&T does not offer any substantive arguments as to why data roaming is *not* a “hybrid service” under CMRS nor does it acknowledge Congress’ original intent to let the Commission, the entity with the expertise on these matters, determine what qualifies as PMS, what qualifies as CMRS and what qualifies as the functional equivalent of CMRS. Instead, AT&T dismisses the rule outright by arguing that because data roaming is not CMRS under the statute, it is not CMRS under the FCC’s rules. Even if data roaming is not determined to be CMRS under the statutory definition, Rule 20.9(a) is both relevant and dispositive. At the very least, data roaming is unequivocally shown to support both voice and data services. Under a data roaming arrangement, visiting roamers can make voice phone calls using a mobile VoIP application as

¹⁶ RTG Reply Comments at 7.

¹⁷ 47 C.F.R. § 20.9.

¹⁸ 47 C.F.R. § 20.3.

well as transmit text messages, IMs, e-mail, multi-media messages and communicate using social networking mediums. Often times these voice and data services can be utilized simultaneously, whether on-network or while roaming. By virtue of this “hybrid” service offering data roaming should be defined as a hybrid service under Rule 20.9, treated as a common carriage service and regulated as commercial mobile radio service.

Data Roaming is a Telecommunications Service

Applying the functional equivalency test and/or the hybrid service test is not the only means by which data roaming qualifies as CMRS. Even if data roaming is not viewed as the functional equivalent of CMRS or if Rule 20.9 is not applicable, the very act of transmitting the traffic generated by the individual roamer from the serving carrier back to the visiting carrier - - without a change in format and without manipulation by the serving carrier (*i.e.*, transport)- - causes data roaming to fall within the well established definition of a telecommunications service, and as such is subject to the Commission’s common carrier regulatory authority under Title II of the Communications Act.

A Focus on Technology Should Not Blind the Commission to Practical Realities

Finally, and perhaps most importantly, the Commission must recognize that regardless of how data roaming is classified in a legal sense, it will remain an indispensable component of mobile communications for the vast majority of consumers, including those consumers living in and travelling through rural America for decades to come. The FCC and the mobile wireless industry must accept two future events as inevitable. First, the traditional public switched telephone network will one day become obsolete, however the human act of transmitting voice communications, while mobile, from one place to another will never become obsolete. Second, because not every mobile operator will have the resources, and especially the requisite FCC licenses, to build and operate a truly nationwide mobile network, the ability of a consumer to “roam” when outside the service area of his or her operator’s native network coverage area is of paramount importance and a given expectation by that consumer. Therefore, it is myopic for the FCC or the industry to ignore the eventuality of both wholly IP-based 3G and 4G mobile networks and the continual integration of mobile VoIP as a practical, economic substitute for what today constitutes both voice communications and voice roaming. Likewise, it is impossible to speculate on the permutations that voice communications will take in the years and decades to come. What we do know is that voice communications will continue in one form or another in a mobile environment; however, the precise way in which that dialog is transmitted becomes irrelevant, particularly when technology outpaces the ability of government to predict every conceivable method or process by which mobile voice/data communications takes place. The Commission has long recognized that the transmission of mobile voice (including while roaming) is a common carrier service; allowing that legal recognition to gradually disintegrate due to technology advances will only hurt American consumers, particularly those in rural markets who depend heavily on mobile roaming services.

If you have any questions, please communicate directly with the undersigned.

Respectfully submitted,

Rural Telecommunications Group, Inc.

/s/ Caressa D. Bennet

By: _____

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General Counsel

cc (via email):

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