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November 22, 2010

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BY ELECTRONIC FILING

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

Re: *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile
Radio Service Providers and Other Providers of Mobile Data Services*; WT
Docket No. 05-265

Dear Ms. Dortch:

MetroPCS Communications, Inc. (“MetroPCS”), by its counsel, hereby responds to the letter from Mr. John T. Scott, III filed on behalf of Verizon Wireless (“Verizon”) on November 8, 2010 (the “Verizon Letter”), in the above-captioned proceeding.¹ As is set forth in greater detail below, the Commission has ample authority to impose meaningful data roaming obligations on wireless broadband data providers, and the Commission should do so as soon as possible.

The Verizon Letter is the latest gambit in its continuing campaign to avoid the reasonable data roaming safeguards being sought by MetroPCS and all other wireless carriers (with the exception of AT&T and Verizon).² Time and time again, Verizon has represented that “the market is working to

¹ Verizon Wireless *Ex Parte* in WT Docket No. 05-265 (filed Nov. 8, 2010). In many respects, the Verizon letter merely echoes claims earlier made by AT&T, Inc. (“AT&T”) in an *ex parte* letter filed on September 22, 2010. See AT&T *Ex Parte* in WT Docket No. 05-265 (filed Sept. 22, 2010) (the “AT&T Letter”). MetroPCS responded to the AT&T Letter on November 11, 2010 and incorporates that response herein by this reference. See MetroPCS *Ex Parte* in WT Docket No. 05-265 (filed Nov. 11, 2010) (the “MetroPCS Nov. 11 *Ex Parte*”). This letter only responds to certain additional claims or authority raised by Verizon. If the Commission would like MetroPCS to respond to other arguments raised, MetroPCS will do so.

² The Commission previously found that merger conditions pertaining to the Verizon roaming policies were necessary in the public interest in connection with the acquisition by Verizon of AllTel Communications. See *Application of Cello Partnership d/b/a Verizon Wireless and Atlantic Holdings*, 23 FCC Rcd 17444 at Section VIII.A. (2008).

provide data roaming to carriers that want it.³ And yet, the limited data Verizon provides proves just the opposite. For example, Verizon indicates that, “[o]f the roaming partners that want data roaming, about 75 percent have an agreement.”⁴ Put another way, fully one fourth of wireless carriers seeking data roaming from Verizon have no agreement. The fact that 25% of wireless carriers who seek data agreements have not yet been accommodated by Verizon clearly demonstrates that the data roaming market is broken.⁵ If more evidence is needed, MetroPCS urges the Commission to require Verizon to provide specifics with respect to those carriers who have requested data roaming agreements and have not yet been accommodated.⁶ MetroPCS falls into this category⁷ and expects to find that the list includes other carriers like MetroPCS who are competing head-to-head with Verizon in multiple markets.⁸ If so, this information will reinforce

³ See *Verizon Wireless Ex Parte* in WT Docket No. 05-256 (Nov. 5, 2010) (“Verizon Nov. 5 *Ex Parte*”) at p. 2.

⁴ Verizon Nov. 5 *Ex Parte*, p. 1. Verizon has provided no documentation supporting its assertions regarding the number of agreements in place, and no evidence to demonstrate that any existing agreements are on reasonable and non-discriminatory terms. Nor has it identified the types of data services supported under such agreements. Further, Verizon has provided no details as to the carriers it has decided to serve and those it has declined to serve and how many potential customers are covered by the data roaming agreements and how many have been left unserved as a result of Verizon’s actions. Even if this data was supplied, the fact that 1 out of 4 carriers who want data roaming do not yet receive it demonstrates that the market is *not* working.

⁵ Verizon also argues that voice roaming rates have “continually declined for years.” Verizon Letter, p. 8. While MetroPCS agrees that this should be the case given the artificially high rates imposed by Verizon in the past, Verizon does not have any evidentiary support for its claim. Indeed, as was shown in the AllTel merger proceeding, the acquisition of AllTel by Verizon would limit competition for roaming and the Commission agreed to conditions which required Verizon to continue to offer AllTel’s lower roaming rates. But for this condition – imposed by the Commission – voice roaming rates would have risen after the AllTel acquisition – and may still do so when the condition expires.

⁶ If the Commission deems it necessary to seek more data, it should have Verizon identify the carriers who have requested data roaming and yet have no agreement, the date that the request for data roaming was made, the status of the negotiations and the issues in dispute that have prevented an agreement from being earlier reached, and whether any data roaming is being provided.

⁷ MetroPCS made a written request more than two months ago for an in-person meeting at Verizon’s earliest convenience to discuss possible amendments to the parties’ existing voice roaming arrangement and to add data services. To date, no meeting has occurred, despite follow-up requests by MetroPCS.

⁸ The language that Verizon uses to describe its 4G roaming policy underscores MetroPCS’ concerns. Verizon indicates that it “will offer 4G roaming to participants in its LTE Rural America program.” This suggests that Verizon intends to discriminate against mid-tier carriers like MetroPCS who are competing with Verizon in major metropolitan areas, and only offer 4G LTE roaming to rural carriers. Such 4G discrimination is particularly indefensible given the indisputable functional equivalence of voice and data services in the

the concern expressed by MetroPCS that AT&T and Verizon are seeking “to reserve to themselves the right to pick winners and losers in the marketplace for mobile broadband services, and thus defeat the laudable goals of the National Broadband Plan.”⁹

I. Verizon Fails In Its Effort to Establish That The Commission Cannot Regulate Data Roaming

For the most part, the Verizon Letter is a “me too” filing that echoes the arguments made by AT&T that the Commission lacks the authority to impose automatic data roaming obligations.¹⁰ MetroPCS will not repeat here the entire rebuttal it recently filed to AT&T’s *ex parte* on the subject. However, there are a few instances in which Verizon makes arguments or cites authorities different from or in addition to those cited by AT&T. As is demonstrated in greater detail below, these additional arguments or authorities do not alter the inescapable conclusion that the Commission has ample authority to adopt the reasonable roaming safeguards sought by MetroPCS and others and that, if the Commission considers data roaming to be a PMRS service, it can impose the requirements sought by MetroPCS without being deemed to be treating data roaming as a common carrier service.

A. Section 153(44) of the Act Does Not Bar Data Roaming Regulations

AT&T argued that the Commission is prohibited from regulating data roaming by Section 332(c)(2) of the Communications Act of 1934, as amended (the “Act”).¹¹ Verizon parrots this Section 332(c)(2) claim, but adds that “Section 153(44) [of the Act] bars the Commission from imposing common carrier obligations on such a service.”¹² Making reference to this second provision of the Act does nothing to further AT&T’s or Verizon’s argument. AT&T – and now Verizon – misunderstands what Section 332(c)(2) means when it states that a private mobile radio service (“PMRS”) carrier cannot be “treated as a common carrier.”¹³ The statutory language,

4G context. *See* MetroPCS Nov. 11 *Ex Parte*, p. 10-11. Verizon’s discriminatory intent is further demonstrated by the fact that MetroPCS and Verizon will be the first carriers to deploy 4G LTE so it would make common sense for them to have one of the first LTE data roaming agreements, but Verizon has to date resisted the MetroPCS overtures.

⁹ MetroPCS Nov. 11 *Ex Parte*, p. 2.

¹⁰ *Compare* Verizon Letter *with* AT&T Sept. 22 *Ex Parte*.

¹¹ 47 U.S.C. § 332(c)(2).

¹² Verizon Letter, p. 1, 10.

¹³ MetroPCS Nov. 11 *Ex Parte*, Section II.A.

legislative history and decided cases all indicate clearly that this simply means that PMRS carriers cannot be made subject to the common carrier regulations set forth in Title II of the Act. The Verizon reference to Section 153(44) does not alter the analysis one bit. This statutory provision provides a definition of “telecommunications carrier” and indicates that such a carrier will be “treated as a common carrier” only to the extent that it is providing telecommunications service.” Based on the well-established canon of statutory construction, the identical phrase “treated as a common carrier” must be read consistently in both Sections 332(c)(2) and 153(44) of the Act.¹⁴ Thus, treatment as a common carrier simply means subjecting a provider directly to the common carrier regulations in Title II. Citing parallel language from 153(44) does not support a different outcome than under Section 332(c)(2). And, as is discussed in greater detail within,¹⁵ the supplemental authorities cited in the Verizon Letter only serve to reinforce MetroPCS’ position regarding the meaning of the phrase “treated as a common carrier” rather than support AT&T’s and Verizon’s argument.

B. NARUC I and NARUC II Clearly Support the MetroPCS Position

Verizon cites both *NARUC I*¹⁶ and *NARUC II*¹⁷ in its letter for the proposition that the *sine qua non* of treating a provider as a common carrier is to require a carrier to provide a service at just and reasonable rates free from discrimination. But these landmark decisions completely undermine the positions of both AT&T and Verizon by making clear that “treatment as a common carrier” simply means regulation under Title II, and does not have anything to do with the requirement that rates be reasonable or non-discriminatory.

In *NARUC I*, the court reviewed the Commission’s classification of specialized mobile radio (“SMR”) systems as non-common carriers. The court correctly described the Commission as having concluded that “SMRs should not be subject to *the common carrier regulations of Title II of the Communications Act.*”¹⁸ Ultimately, the *NARUC I* court upheld the Commission’s determination reasoning that “once the conclusion is reached

¹⁴ *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (“A term appearing in several places in a statutory text is generally read the same way each time it appears.”)

¹⁵ See discussion *infra* at Section I.B.

¹⁶ *Nat’l Ass’n of Regulatory Utility Comm’rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) (“*NARUC I*”).

¹⁷ *Nat’l Ass’n of Regulatory Utility Comm’rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (“*NARUC II*”).

¹⁸ *NARUC I*, 525 F.2d at 635 (emphasis supplied).

that SMRs are not common carriers . . . [o]bviously, *the Title II common carrier provisions are inapplicable.*¹⁹ This language directly supports MetroPCS' position that the prohibition on treating a PMRS carrier as a common carrier simply means that such carriers cannot be made directly subject to the common carrier regulations found in Title II. Nothing more.

NARUC II further supports this conclusion. There, the court was reviewing the Commission's decision to preempt states from exercising common carrier regulatory authority over cable system leased access channels on the ground that cable operators are non-common carriers. Ultimately, the court decided that, because an intrastate "common carrier activity is involved," the Commission was barred from preemption by Section 152(b) of the Act. In the process, as is discussed in greater detail below,²⁰ the *NARUC II* court found the "*sine qua non*" of common carriage to be holding one's self out to provide service indiscriminately to the public – not requiring rates be just and reasonable. Nonetheless, the important point here is the manner in which the *NARUC II* court described the issue raised in *American Civil Liberties Union v. FCC*²¹ as "whether all [cable] access transmissions must be regarded as common carrier activities, and if so, whether the Commission is obligated to apply to them *the affirmative regulations as set forth in Title II.*"²² Once again, this language clearly reinforces the common sense view that "treatment as a common carrier" means simply regulation under Title II.

C. The Commission Has Ample Authority Outside of Title II to Adopt Data Roaming Protections

Verizon repeatedly contends that "no party has been able to cite a single provision of the Act that affords the Commission express authority to impose a data roaming mandate."²³ This assertion is false. MetroPCS has established that Section 332(a) provides the Commission ample authority to regulate PMRS "consistent with Section 1 of this Act," which in turn requires the Commission to foster "so far as possible" a "nationwide . . . radio communication service . . . at reasonable charges."²⁴ Section 332(a) also empowers the Commission to promote "efficiency of spectrum use," "competition," "services to the largest feasible number of users" and

¹⁹ *Id.*

²⁰ See discussion *infra* at Section I.D.

²¹ *American Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975).

²² *NARUC II*, *supra*, 533 F.2d at 620 (emphasis supplied).

²³ Verizon Letter, p. 1, 14.

²⁴ 47 U.S.C. § 332(a) and 151.

“interservice sharing”.²⁵ All of these objectives would be served by the imposition of an automatic data roaming requirement proposed by MetroPCS.

Furthermore, MetroPCS also has demonstrated that the Commission has the statutory authority to regulate data roaming as the “functional equivalent” of CMRS.²⁶ In sum, the Commission’s authority to adopt reasonable data roaming regulations is clear.

D. Verizon Misreads the Precedents it Cites

Verizon characterizes MetroPCS and others as seeking to impose data roaming regulations that require “service upon reasonable request; the provision of service with reasonable rates and on reasonable terms, [and] the provision of service free from unreasonable discrimination.”²⁷ It then claims that “[s]uch requirements go to the ‘primary *sine qua non* of common carrier status.’”²⁸ However, Verizon completely mischaracterizes the case law that establishes the *sine qua non* of common carriage. The well-established core test is whether a carrier does, or is required to, serve the public indiscriminately. A long line of cases establishes beyond doubt that the many elements of individualized decisionmaking that data roaming partners will remain free to make defeat any claim that the proposed data roaming requirements convert it into a common carrier offering.

In *NARUC II*, the Court held that “the primary *sine qua non* of common carrier status . . . arises out of the undertaking ‘to carry for all people indifferently . . .’”²⁹ The decision explicitly states that “... it is the practice of such indifferent service that confers common carrier status. That is to say, a carrier will not be treated as a common carrier where its practice is to make individualized decisions in particular cases whether and on what terms to serve.”³⁰ Similarly, *Midwest Video II*,³¹ which also is cited by Verizon,³² finds the Supreme Court agreeing with the *NARUC II* court that the essence of common carriage is that “[a] common carrier does not ‘make

²⁵ 47 U.S.C. § 332(a)(1) through (4).

²⁶ See discussion *infra* at pp. 10-11.

²⁷ Verizon Letter, p. 2.

²⁸ *Id.*

²⁹ *NARUC II*, 533 F.2d at 608; see also Verizon Letter at n.54 and accompanying text.

³⁰ *Id.* at 608-609.

³¹ *FCC v. Midwest Video Corp.*, 440 U.S. 689, 702 (1979).

³² Verizon Letter, n.5.

individualized decisions, in particular cases, whether and on what terms to deal.’³³

Subsequent to these landmark decisions, the Commission has released a series of decisions which further identify the circumstances and the kinds of “individualized decisions” that are indicative of non-common carrier status. For example, in *Satellite Business Systems*,³⁴ the Commission observed: “Factors that indicate non-common carrier operations include the existence of long-term contractual relationships, a high level of stability in the customer base, and individually tailored arrangements.”³⁵ The Commission also has made clear repeatedly that “user compatibility is an important consideration for private carriers.”³⁶ Thus, in *Hughes Communications, Inc.*,³⁷ the Commission found individualized decisionmaking when the service provider took into consideration “the personal and operational compatibility of a particular applicant.”³⁸ Another indicator that a service is properly considered to be private is whether the offering carrier treats the underlying service agreement as confidential.³⁹ All of these decisions support the established view that the “critical inquiry is whether a carrier makes *ad hoc* determinations about the provision of service to particular customers.”⁴⁰

The data roaming obligations requested by MetroPCS allow roaming partners to make individualized decisions on an *ad hoc* carrier-by-carrier basis. Host carriers will not be offering roaming services indiscriminately to the public, but rather will confine their offering to a select clientele of licensed carriers that negotiate individual roaming agreements. The agreements will generally be on a medium to long term basis, but the length of the contract

³³ *Federal Communications Commission v. Midwest Video Corporation*, 440 U.S. 689, 702 (1979).

³⁴ 95 FCC 2d 866 (1983).

³⁵ *Id.* at para. 11; *see also Brown University*, 7 FCC rcd 5523 (*Com. Car. Bur* 1992) (finding the resale of excess earth station capacity not to be a common carrier offering due to the existence of individually negotiated long term contacts). All of these factors support the view that data roaming agreements are individualized.

³⁶ *Norlight*, 2 FCC Rcd 5167, para. 14 (1987). Technical compatibility is a prominent issue in data roaming agreements.

³⁷ *Hughes Communications, Inc.*, 90 FCC 2d 1238 (1982).

³⁸ *Id.* at para 45. *See also General Services Administration*, 63 RR 2d 713, n.8 (1987) (citing *NARUC II* for the proposition that offerings tailored to the personal and operational compatibility of a particular applicant are indicia of non-common carriage).

³⁹ *Sprint Communs. Co. L.P. v. Neb. PSC*, 2007 U.S. Dist. LEXIS 66902, para. 26 (D. Neb. Sept. 7, 2007) (confidential nature of service agreement cited as a factor in concluding that Sprint was not offering service indiscriminately). Verizon and AT&T always have sought to protect their roaming agreements as confidential.

⁴⁰ *AT&T Corp. v. Jefferson Telephone Co.*, 16 FCC Rcd 16130, para. 10 (2001).

can and will vary depending upon the individual circumstances of the parties. The roaming partner will take into consideration the technical and operational compatibility of the home carrier's system and service, and the terms of the roaming arrangement and the markets and territories covered will vary. The service will not be offered by tariff, or on standard terms to every home carrier, but rather will be subject to an individually negotiated contract that the roaming partner will treat as confidential. And, the roaming rates may vary depending upon the anticipated volume of traffic, the extent to which each carrier is willing to recognize the other as its preferred roaming partner, whether or not the arrangement is reciprocal, the extent to which roaming traffic is given priority or not, and the number and scope of the markets covered. Taking these individualized elements into consideration, it is clear under *NARUC II*, *Midwest Video II* and their progeny, that the data roaming requirement sought by MetroPCS will not result in indiscriminate service, nor result in data roaming being treated as a common carrier service.

The decision in *Virgin Island Telephone Corp. v. FCC*,⁴¹ which arose in the specific context of a carrier-to-carrier service, establishes beyond doubt that the amount of individual discretion retained by the roaming partner is sufficient to preclude a finding that a data roaming requirement compels a conclusion that data roaming is being offered indiscriminately to the public. There, the court upheld a Commission determination that the sale of submarine fiber optic cable capacity by an affiliate of AT&T to common carriers, who in turn were going to use it to provide telecommunications services to the public, should be treated as non-common carrier service. First, the Commission decided, given the fact that AT&T was wholesaling the service to a select group of carrier customers, that it was not providing service "directly to the public, or to such classes of users to be effectively available directly to the public" notwithstanding the fact that the acquired capacity was being used by the carrier customers to provide telecommunications services to the public.⁴² Second, the Commission found that AT&T "will not sell capacity in the proposed cable indifferently to the public" because it intended to "engage in negotiations with each of its customers on the price and other terms which would vary depending on the customers' capacity needs, duration of the contract, and technical specifications."⁴³ This meant that it met the *NARUC II* test of making "individualized decisions, whether and on what terms to serve."⁴⁴ Here, the

⁴¹ *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 2006).

⁴² *Id.* at 924.

⁴³ *Id.* at 925.

⁴⁴ *Id.*

same analysis leads inescapably to the conclusion that requiring carriers to offer data roaming to compatible carriers on a negotiated basis is not treating the roaming partner as a common carrier.

Given these precedents, the Commission has ample authority to adopt the proposed automatic data roaming rule and still treat the carrier to carrier service offered by the roaming partner as a non-common carrier service. The Verizon Letter expressly admits that, at present, Verizon “makes ‘individualized decisions, in particular cases, whether or on what terms to deal’ with potential data roaming partners.”⁴⁵ While the activities of roaming partners would be subject to certain reasonable public interest requirements, the roaming carrier would retain the right to make individualized decisions regarding the nature, extent and terms of service.

II. The Prior Recognition of Automatic Voice Roaming As a Common Carrier Service Does Not Preclude the Regulation of Data Roaming

Verizon seeks refuge in the prior Commission determination that “automatic roaming is a ‘common carrier obligation’ in the voice roaming context.”⁴⁶ It uses this prior Commission holding as a springboard to leap to the illogical conclusion that any form of data roaming regulation also cannot “be classified as anything other than a common carrier regulatory regime.” This makes no sense at all.

The Commission holding that voice roaming is a common carrier service is unremarkable. One of the few things that *all* parties to the roaming proceeding agree on is that voice roaming is a CMRS service. Section 332(c)(1) expressly provides that a person engaged in the provision of CMRS “shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this Act.”⁴⁷ The Act does not say that every roaming service, whether or not CMRS, will be subject to a common carrier regulatory regime. Nor does it say that, if one service is treated as CMRS or as a common carrier service, then all other similar services can only be regulated as common carrier services.⁴⁸ There simply is no rational basis for

⁴⁵ Verizon Letter, p. 12.

⁴⁶ *Id.* at p. 3.

⁴⁷ 47 U.S.C. § 332(c)(1).

⁴⁸ Verizon’s logic does not stand up. Essentially, Verizon argues that, if voice roaming is a common carrier service and must be provided at reasonable rates and without discrimination, *then* requiring data roaming to be provided on reasonable rates without discrimination would be to treat it as a common carrier service. What Verizon fails to recognize is that it is not the rate regulation which causes a service to be treated as a common carrier, but rather whether the roaming partner offers the service indiscriminately

the Verizon argument that the prior classification of CMRS voice roaming as common carriage prohibits the Commission from classifying data roaming differently.

The prospect that voice and data roaming may be subject to different regulatory regimes also is unsurprising given the inherent differences between these services. In the voice context, the roamer is looking to the roaming partner to provide a mobile service that is virtually identical to the service provided by the roaming carrier to all of its customers. In the data context, the roamer generally is looking to the roaming partner to provide only a transmission service – the home carrier not the roaming partner provides the information service that has been subscribed to. Thus, the service provided by the data roaming partner to a roaming customer is different in kind from that provided by the roaming partner to its own customers. Only a transmission service is provided to the roaming customer of the home carrier; the service provided by the roaming partner to its own customers is fully integrated with its information service.⁴⁹ In light of these differences (which incidentally arise out of the fact that the roaming component of data services is not functionally integrated⁵⁰) the regulation of voice and data roaming services under different statutory provisions and regulatory regimes is not a matter of concern.⁵¹

III. Verizon Fails to Add to the Functional Equivalence Debate

Verizon concedes, as it must, that the Commission can regulate data roaming as a common carrier service under Title II if it is the “functional equivalent” of CMRS.⁵² It then largely parrots the AT&T arguments – which MetroPCS already has fully rebutted⁵³ – in an unsuccessful attempt to defeat functional equivalence. Verizon does, though, make the curious assertion that “if voice roaming and data roaming were true economic and functional substitutes . . . there would be no perceived need for data

to the public. Since individualized decisions abound for the contractual carrier-to-carrier data roaming service, it is not being treated as a common carrier service.

⁴⁹ This conclusion holds regardless of whether the transmission service is provided using the local breakout option described by Verizon or AT&T or is provided via a transmission back to the home carrier as described by MetroPCS. In either case, the roaming partner provides more services to its own home customers than it does when it serves roamers of the home carrier – such as email, filtering, etc.

⁵⁰ See discussion *infra* at pp. 12-13.

⁵¹ It does not matter whether the local breakout option on the route back to the home carrier option is used. In either case, the home carrier, not the roaming partner, is providing the information service and the roaming partner is primarily only a transmission service.

⁵² Verizon Letter, p. 6-8.

⁵³ See AT&T Sept. 22 *Ex Parte*, 5-6; MetroPCS Nov. 11 *Ex Parte*, 4-10.

roaming.”⁵⁴ Apparently, Verizon Wireless is arguing that data roaming would not be flourishing if it was a mere surrogate for voice roaming. This argument, taken to its logical extreme, would eliminate any instance of functional equivalence since, according to Verizon, the mere proliferation of an alternative would be deemed a sufficient basis to defeat a finding of equivalence.⁵⁵

Verizon also contends that data roaming makes available many applications (*e.g.*, database access, Internet access, email and video-streaming) that “bear no functional relationship to CMRS voice service.” Of course, the legal test is functional equivalence, not relationship. In any event, the test is not whether one service may allow customers greater options or follow on services, but rather whether a simple increase in price in one service will cause a change in demand for the other service. Further, it is obvious that these specialized data applications are directly substitutable for CMRS voice services. An end user wanting to get a message to another individual can place a voice call, or send an email. A person looking for movie listings can call the theater or use Internet access to go on-line and check such listings. And, a video-streaming Skype call certainly can replace a standard wireless voice call. Significantly, if the substitution of these services takes place while the customer is roaming, this end user will be selecting the voice roaming services of the roaming partner in lieu of the data roaming services (or vice versa). Thus, contrary to the claims of Verizon, these examples provide a perfectly rational basis to support a finding of functional equivalence of the wholesale roaming services.

IV. Verizon Misapplies the Telecommunications Service/Information Service Dichotomy

Unlike AT&T, Verizon correctly understands that the PMRS/CMRS dichotomy does not replace the telecommunications service/information service dichotomy that also has a bearing on regulatory treatment.⁵⁶ Consequently, a significant portion of the Verizon Letter is devoted to the argument that data roaming is an information service and “as an information service *must not* be subject to the regulatory obligations of common

⁵⁴ Verizon Letter.

⁵⁵ A simple example will show the fallacy of Verizon’s position. For example, the markets are flourishing for both imported and domestic beer. The fact that both are flourishing does not mean that a small price change in one (*e.g.*, 5%) would not cause customers to switch to the other product. Here, the same is true for data services and voice services as demonstrated in MetroPCS’ reply to AT&T. MetroPCS Nov. 11 *Ex Parte*, Section I.3.

⁵⁶ AT&T mistakenly asserts that the CMRS/PMRS dichotomy is “controlling” and seeks to dismiss the relevance of the fact that data roaming is a severable telecommunications service and not part and parcel of a functionally integrated information service. *See* MetroPCS Nov. 11 *Ex Parte*, n.40.

carriage.”⁵⁷ But, this claim ignores the consistent analytical framework the Commission has taken in ascertaining whether a particular service – which includes *both* a telecommunications transmission component and information processing – will be regulated as an information service.

The analysis starts with the Supreme Court’s *Brand X* decision.⁵⁸ In *Brand X*, the Court found that cable companies providing broadband Internet access were properly classified as providing an “information service” rather than a “telecommunications service.” In reaching this holding, the Court’s majority concluded that “the transmission component of cable modem service is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering.”⁵⁹ The Court found sufficient integration because the “consumer uses the high-speed wire *always* in connection with the information-processing capabilities provided by Internet access, and because the transmission is a *necessary component* of Internet access.”⁶⁰ The Court continued that “[t]he entire question is whether the products here are functionally integrated (like the components of a car) or functionally separate (like pets and leashes).”⁶¹

Under this established analytical framework, data roaming does *not* constitute an information service. As an initial matter, the services provided by the home carrier to the customer and the data roaming provided by the roaming partner are different. The home carrier provides an information service since it provides its customers email, navigation, and other services which clearly meet the definition of information service. The roaming partner on the other hand does not provide an information service, but rather provides a simple transmission service which is properly characterized as a telecommunications service. Further, under the Supreme Court’s *Brand X* decision, the transmission service provided by the roaming partner clearly is severable from the information services since it is provided to different parties and does not include any retrieval, manipulation or storage of content or data.⁶²

Further, a wireless customer can enjoy wireless Internet access when in its home market and not roaming, just as a consumer can buy a pizza

⁵⁷ Verizon Letter, p. 13.

⁵⁸ *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 907 (2005). (“*Brand X*”).

⁵⁹ *Id.* at 990.

⁶⁰ *Id.* (emphasis added).

⁶¹ *Id.* at 991.

⁶² As MetroPCS has previously demonstrated, the provision of DNS in the context of a telecommunications service does not convert such service to an information service. *See* MetroPCS Reply Comments, p. 47-48.

without using a pizza delivery service.⁶³ The telecommunications capability offered by the roaming partner is non-integrated and severable. Thus, Verizon misses the point when it states that “the Commission has found that broadband Internet access falls within this [information service] definition.”⁶⁴ The Commission previously has found that the wireless Internet access service provided by the home carrier is an information service. The Commission is right in this determination, but Verizon and AT&T are wrong that this retail end-user service classification dictates the regulatory treatment of the distinct carrier-to-carrier wholesale data roaming service. Indeed, the Commission never has held that the separate carrier-to-carrier service offered by the roaming partner is an information service and it should not here since it is a severable telecommunications service.

Verizon also cites the *Wireless Broadband Classification Order*⁶⁵ to “support” its information service argument, but that decision actually undermines its position. In the *Wireless Broadband Classification Order*, the Commission discusses the manner in which it applied the analytical framework from *Brand X* to a whole host of services – including cable modem Internet access, wireline broadband Internet access, and Broadband over Powerline (“BPL”) enabled Internet access – each of which contained a telecommunications component. Nonetheless, the Commission found each service to be properly classified as information services because the “telecommunications transmission component” was “functionally integrated.” As described above, and in further detail in MetroPCS’ comments and reply comments,⁶⁶ the wholesale carrier-to-carrier data roaming transmission service is *not* functionally integrated with broadband Internet access, and indeed is a severable telecommunications service; which can and should be regulated by the Commission.

V. Conclusion

As MetroPCS and others repeatedly have noted, the Commission has the clear authority to impose reasonable requirements on carriers to provide automatic data roaming. Time is of the essence because the data roaming market is starting out at the precise point where market forces broke down in the voice market. Two carriers – AT&T and Verizon – have footprints large enough to give them a powerful economic incentive to deny reasonable roaming access to their competitors.

⁶³ The majority opinion in *Brand X* cites pizza and pizza delivery as an example of non-functionally integrated offerings. *Brand X*, 545 U.S. at 992.

⁶⁴ Verizon Letter, p. 10.

⁶⁵ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5921 (2007) (“*Wireless Broadband Classification Order*”).

⁶⁶ See MetroPCS Comments and MetroPCS Reply Comments.

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The Commission also cannot accept the Verizon position that there are suitable alternatives to data roaming – such as the ever-increasing availability of WiFi-enabled devices and WiFi hotspots – that make roaming unnecessary on the Verizon and AT&T data networks.⁶⁷ The Commission never has found it to be reasonable for a carrier to deny a reasonable request for service on the basis that the requesting carrier could go elsewhere. Indeed, the charge in Section 1 of the Act is to promote “Nation-wide” service “so far as possible.” Limiting data roaming to the small subset of customers that have WiFi enabled phones would not satisfy this requirement particularly given the non-ubiquity of WiFi hotspots.

In sum, in order to promote the goals of the National Broadband Plan, increase the build-out of 4G services and enhance the available competitive choices for consumers, the Commission should act as soon as possible to adopt automatic data roaming obligations on a just, reasonable and non-discriminatory rate basis.

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

Respectfully submitted,



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⁶⁷ See Verizon Nov. 5 *Ex Parte*, p. 4-5.