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March 31, 2011

57739.00015

**VIA ELECTRONIC FILING**

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

Re: *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 March 30, 2011 (the “Verizon Letter”), in the above-captioned proceeding. The Verizon Letter argues that requiring “a facilities-based provider of commercial mobile data services to offer roaming arrangements to other such providers on commercially reasonable terms and conditions” is a common-carrier requirement, and cannot be applied in the context of data roaming.<sup>1</sup> Verizon’s claim is wrong.

As MetroPCS has made clear in its prior filings in this proceeding,<sup>2</sup> the Commission has ample authority to impose data roaming obligations on wireless broadband data providers using a variety of jurisdictional underpinnings. Based on MetroPCS’ current understanding of the selected “commercially reasonable terms and conditions” approach, it falls well within previously stated authorities, and is not tantamount to common carrier treatment, because it allows offering carriers to engage in individualized decisionmaking.

Verizon claims that the data roaming order being considered by the Commission means that it is “compelled to serve all qualified users.”<sup>3</sup> Verizon contends that an obligation to offer data roaming to technologically-compatible carriers on commercially reasonable terms and conditions is a common-carrier obligation because it forces Verizon to “strike data roaming arrangements with all qualified entities indiscriminately.”<sup>4</sup> This statement

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<sup>1</sup> Verizon Wireless *Ex Parte*, WT Docket No. 05-265, at 1 (filed Mar. 30, 2011).

<sup>2</sup> See MetroPCS Communications, Inc. *Ex Partes*, WT Docket No. 05-265 (filed Nov. 11, 2010 and Nov. 22, 2010 (“MetroPCS Verizon Response”). These two filings are included as attachments to this *ex parte* filing.

<sup>3</sup> Verizon Letter at 3.

<sup>4</sup> *Id.*

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plainly is false. Carriers will not be forced to take on all comers “indiscriminately” – rather, carriers simply must offer data roaming to other carriers on commercially reasonable terms and conditions, which are individually negotiated. Providing carriers are free to negotiate different terms and conditions for each requesting carrier – the very essence of “discrimination” among offers – so long as its actions are commercially reasonable. Significantly, Verizon does not point to (because no such precedent exists) any instance where requiring an offer to be “commercially reasonable” has been classified as a common carrier obligation by the Commission.

Indeed, Verizon’s own statements thwart its attempts to muddle the plain distinction between common carriage obligations and a requirement that service be offered on commercially reasonable terms and conditions. By its own admission, currently “Verizon Wireless makes ‘individualized decisions, in particular cases, whether and on what terms to deal’ with potential roaming partners.”<sup>5</sup> Under the Commission’s proposed data roaming standard, Verizon is free to continue to make such “individualized decisions,” so long as the agreements it enters into are commercially reasonable. This clear fact rebuts Verizon’s assertions that the commercially reasonable standard is akin to a common carrier obligation. As MetroPCS has pointed out, there are numerous instances in which the Commission has found that individualized decisionmaking belies a common carrier designation:

- The Commission’s decision in *Virgin Island Telephone Corp. v. FCC*, which arose in the specific context of a carrier-to-carrier service, establishes that the amount of individual discretion retained by the roaming partner under the Commission’s approach is sufficient to preclude a finding that data roaming must be offered indiscriminately to the public.<sup>6</sup>
- In *Satellite Business Systems*, the Commission observed that “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,”<sup>7</sup> all of which are applicable to the Commission’s formulation here.
- In *Hughes Communications, Inc.*, the Commission found individualized decisionmaking when the service provider took into consideration the “personal and operational compatibility of a particular applicant,”<sup>8</sup> which roaming providers will be free to do here.

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<sup>5</sup> *Id.* at 5 (citing Reply Comments of Verizon Wireless, WT Docket No. 05-265, at 32 (Jul. 12, 2010)).

<sup>6</sup> See *Virgin Islands Tel. Corp. v. FCC.*, 198 F.3d 921 (D.C. Cir. 2006) (Court upheld a Commission determination that the sale of submarine fiber optic cable capacity should be treated as a non-common carrier service).

<sup>7</sup> See MetroPCS Verizon Response at 7 (citing 95 FCC 2d 866 (1983)).

<sup>8</sup> See *id.* (citing 90 FCC 2d 1238 (1982)).

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- Under *NARUC II*, *Midwest Video II* and their progeny it is clear that the data roaming requirement being considered by the Commission will not result in indiscriminate service, nor result in data roaming being treated as a common carrier service.<sup>9</sup>

Given such precedent, 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.

Moreover, the Verizon Letter cites both *NARUC I*<sup>10</sup> and *NARUC II*<sup>11</sup> 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. Verizon completely misreads these decisions. As MetroPCS previously has stated, the court in *NARUC I* merely described the Commission as having concluded that “SMRs should not be subject to *the common carrier regulations of Title II of the Communications Act.*”<sup>12</sup> This statement clearly 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, and nothing more.<sup>13</sup>

Indeed, *NARUC II* also supports MetroPCS’ position. The *NARUC II* court found the “*sine qua non*” of common carriage is to hold one’s self out to provide service indiscriminately to the public – not require service be offered on commercially reasonable terms and conditions (as well as be technologically compatible). The manner in which the *NARUC II* court described the issue raised in *American Civil Liberties Union v. FCC*<sup>14</sup> 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.*”<sup>15</sup> Once again, this language clearly reinforces the common sense view that “treatment as a common carrier” means simply regulation under Title II, not any form of requirement that rates be reasonable – or commercially reasonable. As long as the Commission does not subject roaming carriers directly to the strictures of Title II, it is not treating them as common carriers and can implement other requirements in the public interest. Thus, the measured course the Commission appears to have taken in the item would be well within its authority.

In sum, the Commission has clear authority to regulate data roaming, and it should do so despite Verizon’s last-ditch efforts to misinterpret Commission and judicial precedent.

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<sup>9</sup> See *id.* at 8.

<sup>10</sup> *Nat’l Ass’n of Regulatory Utility Comm’rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) (“*NARUC P*”).

<sup>11</sup> *Nat’l Ass’n of Regulatory Utility Comm’rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (“*NARUC IP*”).

<sup>12</sup> *NARUC I*, 525 F.2d at 635 (emphasis supplied).

<sup>13</sup> Even though MetroPCS has argued previously that the Commission has the authority to regulate data roaming under Title II, the Commission clearly has the right to regulate data roaming under other jurisdictional authority.

<sup>14</sup> *American Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975).

<sup>15</sup> *NARUC II*, *supra*, 533 F.2d at 620 (emphasis supplied).

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March 31, 2011  
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Sincerely,

A handwritten signature in black ink, appearing to read 'Carl W. Northrop', written in a cursive style.

Carl W. Northrop  
of PAUL, HASTINGS, JANOFSKY & WALKER LLP

cc: (via email) Rick Kaplan  
Angela Giancarlo  
John Giusti  
Charles Mathias  
Louis Peraertz  
Austin Schlick  
Ruth Milkman  
James Schlichting

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# **Attachment 1**

MetroPCS November 11, 2010 *Ex Parte*  
Response to AT&T Letter

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November 11, 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 counsel, hereby responds to certain claims made in the letter from Mr. Michael Goggin filed on behalf of AT&T, Inc. (“AT&T”) on September 22, 2010, in the above-captioned proceeding (the “AT&T Letter”).<sup>1</sup> As is set forth in greater detail below, contrary to AT&T’s arguments, the Commission has ample authority to impose meaningful data roaming obligations on wireless broadband data providers, and should do so as soon as possible.<sup>2</sup>

Before addressing AT&T’s legal arguments that the Communications Act of 1934, as amended (the “Act”), prohibits the Commission from establishing data roaming obligations, the Commission should note the significant resources that both AT&T and Verizon Wireless are devoting to their efforts to remain free of any data roaming obligations. The AT&T claim that it is willing, as a result of normal competitive market forces, to

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<sup>1</sup> Verizon Wireless recently filed an *ex parte* making many of the same claims as AT&T with respect to data roaming being PMRS that cannot be subject to common carrier regulation by the Commission. *See Verizon Wireless Ex Parte* in WT Docket No. 05-265 (filed Nov. 8, 2010). MetroPCS is responding to those particular arguments of Verizon Wireless here as well. MetroPCS is reviewing the other Verizon Wireless arguments and will, if appropriate, respond to them separately in due course.

<sup>2</sup> MetroPCS is focusing this response primarily on AT&T’s argument that data roaming is a private mobile radio service that the Commission cannot require be offered on a nondiscriminatory basis at reasonable rates. If the Commission desires a response to any other claim made by AT&T, MetroPCS will be glad to supplement this letter.

enter into reasonable roaming agreements with other carriers upon request<sup>3</sup> rings particularly hollow in light of this intensive campaign. Verizon Wireless also makes a similar claim that it “continues to enter into data roaming agreements, including agreements for broadband 3G data roaming” and that “market forces are working.”<sup>4</sup> If AT&T and Verizon Wireless truly are offering data roaming on reasonable terms upon request, they have no reason to be concerned about the data roaming obligation MetroPCS and most other carriers are advocating.<sup>5</sup> The concerted collective efforts of the two largest national carriers to avoid automatic data roaming requirements evidence their intentions to discriminate and refuse to offer data roaming to certain potential competitors of their choosing.<sup>6</sup> In this manner, the two largest national carriers can 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*.<sup>7</sup> The result could be a further enhancement of the dominant positions that the two largest national carriers currently enjoy in the wireless market, which would be detrimental to consumers. The Commission should not, and must not, allow this to happen.

## **I. The Commission has the Requisite Authority to Regulate Data Roaming**

AT&T’s argument can be summarized as follows: (a) data roaming is a private mobile service (“PMRS”) as defined by Section 332(d)(3) of the Act; (b) Section 332(c)(2) of the Act prohibits the Commission from treating a service provider as a common carrier while offering PMRS; and, (c) requiring service to be offered on a nondiscriminatory basis and at

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<sup>3</sup> See Notice of *Ex Parte* Presentation from AT&T, Inc., *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, in WT Docket No. 05-265 (filed April 14, 2010).

<sup>4</sup> Verizon Wireless *Ex Parte* November 5, 2010.

<sup>5</sup> See note 1, *supra*; see also Notice of *Ex Parte* Presentation from Verizon Wireless, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, in WT Docket No. 05-265 (filed Nov. 5, 2010) (reporting on Verizon Wireless meetings with FCC staff in which it opposed the adoption of data roaming obligations on the ground that market forces are working to make data roaming agreements available to carriers who want them).

<sup>6</sup> Indeed, Verizon Wireless has indicated to another carrier in the context of data roaming negotiations that Verizon Wireless is not interested in the potential roaming revenues that it would be able to receive via such a relationship; rather it is more interested in taking the other carrier’s customers.

<sup>7</sup> See CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, in GN Docket No. 10-66 (rel. March 16, 2010) (“*National Broadband Plan*”)

reasonable rates is the *sine qua non* of common carrier regulation; therefore, these requirements cannot be imposed on automatic data roaming services.

The AT&T argument fails on several grounds: (a) data roaming is not PMRS because it is the “functional equivalent” of a commercial mobile service (“CMRS”); (b) even if data roaming is regulated as PMRS, (i) based upon the plain language and the legislative history of the Act, the prohibition that a PMRS provider cannot be “treated as a common carrier” under Section 332(c)(2) simply means that PMRS carriers cannot be subjected to the specific strictures of Title II, Part I (which is specifically designated in the Act as “Common Carrier Regulation”) and, (ii) Section 332(a) clearly empowers the Commission to mandate that automatic data roaming be offered on a nondiscriminatory basis on reasonable rates, terms and conditions, despite its being PMRS. Further, although AT&T tries to hide behind the *Midwest Video* decision, its arguments are unpersuasive because that case clearly is distinguishable. Finally, the Commission must not accept the arguments of AT&T and Verizon Wireless that they should be able to give priority access to their own customers to the detriment of roaming customers of other carriers.

**A. The Inquiry in the *Second Notice* is Not Limited to CMRS Services**

AT&T’s first line of defense against an automatic data roaming obligation is that data roaming is not a CMRS service because it does not involve interconnection to the PSTN and is not offered indiscriminately to the public.<sup>8</sup> This point is largely irrelevant. The *Second Further Notice of Proposed Rulemaking* (the “*Second Notice*”) in this proceeding<sup>9</sup> specifically sought comment “on whether any such [automatic mobile data roaming] obligations should apply . . . more broadly to facility-based mobile data service providers whether or not they also provide CMRS.”<sup>10</sup> Thus, given the broad scope of the *Second Notice*, AT&T cannot escape the application of an automatic data roaming rule simply by claiming it is not a CMRS carrier. As numerous commenters in the proceeding have correctly observed,<sup>11</sup> a

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<sup>8</sup> AT&T Letter, p. 1.

<sup>9</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, in WT Docket No. 05-265 (rel. April 21, 2010) (“*Second Notice*”).

<sup>10</sup> *Id.* at ¶ 50.

<sup>11</sup> See, e.g., Comments of Sprint Nextel Corporation, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, in WT Docket No. 05-265, at 2 (filed June 14, 2010) (“In fact, extending the current automatic roaming rule to such data services not only will help satisfy consumer expectations for

robust data roaming entitlement is essential to foster the development of broadband services as contemplated in the *National Broadband Plan*.<sup>12</sup> This is true even if the Commission accepts the AT&T argument that data roaming is a PMRS service and not the functional equivalent of CMRS.

## **B. Data Roaming is Functionally Equivalent to CMRS**

The core argument in the AT&T Letter is that data roaming service is PMRS which the Commission is barred from treating as a common-carrier service. Nevertheless, AT&T concedes, as it must, that the carrier-to-carrier data roaming service it provides cannot be considered PMRS if it is the “functional equivalent” of a commercial mobile service.<sup>13</sup> AT&T then proceeds to defy common sense and precedent by arguing that data roaming “is in no respect the functional equivalent of any CMRS service.”<sup>14</sup> This AT&T claim relies upon tortured logic, and is wrong, both as a matter of fact and law. Carrier-to-carrier data roaming is the functional equivalent of CMRS service both because the functions performed by the roaming provider to facilitate data roaming are the same as those performed by the roaming provider to facilitate voice roaming and because data services are increasingly becoming economic substitutes for wireless voice services (which are CMRS).

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seamless, ubiquitous service nationwide, at just and reasonable prices, but also will serve to promote mobile broadband deployment and competition.”); Comments of SouthernLINC Wireless, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, in WT Docket No. 05-265, at iii (filed June 14, 2010) (“The National Broadband Plan recognized that access to automatic roaming for mobile data services is essential for competitive entry and network deployment . . . Existing service providers and new entrants alike must therefore be able to provide consumers with this seamless connectivity even before the deployment of their own advanced network infrastructure is complete.”); Comments of United States Cellular Corporation, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, in WT Docket No. 05-265, 2 (filed June 14, 2010) (“[I]n March, 2010, the FCC released the National Broadband Plan, which discussed the importance of data roaming ‘to broadband competition and innovation policy.’ Without a data roaming requirement, the promise of wireless broadband access will not be kept for customers of small and midsized carriers when traveling outside their home markets.”).<sup>12</sup> *National Broadband Plan* at 49 (“Data roaming is important to entry and competition for 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.”).

<sup>13</sup> AT&T Letter, p. 5-6; see also 47 U.S.C. § 332(d)(3) (defining “private mobile service” as a mobile service that is not CMRS “or the functional equivalent of a commercial mobile service.”)

<sup>14</sup> AT&T Letter, p. 1.

**1. The Functions Performed for Data Roaming are the Same as those Performed to Provide Voice Roaming**

AT&T seeks to dismiss showings by MetroPCS and Leap that, because the roaming provider uses the same facilities and transmission paths to provide both services, data roaming is functionally equivalent to voice roaming.<sup>15</sup> Specifically, AT&T claims that, in data roaming, the roaming provider typically creates a “tunnel” back to the home carrier which then completes the connection to the Internet. In contrast, according to AT&T, in voice roaming the roaming provider itself delivers the call to the public switched telephone network rather than transmitting it back to the home carrier.

However, AT&T’s own prior filings in this docket fully rebut this argument. During the comment phase of this proceeding, AT&T acknowledged that “there are a number of different ways of provisioning data roaming.”<sup>16</sup> One way, often referred to as the “local breakout option,” enables the roaming provider to patch the data session into the Internet instead of sending the data session back to the home carrier. As stated by AT&T, “both the 3G and LTE standards permit a wireless broadband provider to provision data roaming by providing Internet service provider functions itself on its own network.”<sup>17</sup> Obviously, in this configuration, voice roaming and data roaming do look identical in terms of the technical configuration of the interactions between the home carrier and the roaming provider and the functions performed by each. In light of this admitted option, AT&T should not now be heard to deny functional equivalence based upon the use of common facilities and transmission paths. MetroPCS previously demonstrated that, once functional equivalence has been found in one configuration, it must be found for all because the Commission does not favor having the regulatory treatment of services and carriers be capable of manipulation simply by carriers altering their system configurations or call handling processes.<sup>18</sup>

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<sup>15</sup> AT&T Letter, p.6.

<sup>16</sup> Reply Comments of AT&T, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, in WT Docket No. 05-265, at n.44 (filed July 12, 2010).

<sup>17</sup> *Id.*

<sup>18</sup> *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*).

The AT&T attack also fails because the test is “functional equivalence,” not absolute identicalness. Data roaming remains a pure transmission service whether or not the data session is returned back to the home carrier for connection to the Internet. Regardless of whether a data roaming session is sent back to the original carrier or delivered to the Internet via the local breakout option, the roaming partner is providing only the mobility portion and is handing the call/data session off to another (either the home carrier or an Internet provider) to be completed. Since the test is for equivalent functions, not identical functions, it clearly is met in this situation.

## **2. Data Roaming and Voice Roaming are Functional Equivalents From an Economic Standpoint**

Section 20.9(a)(14)(B) of the Commission’s rules<sup>19</sup> provides:

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.<sup>20</sup>

AT&T relies on this provision to argue that data roaming is not the functional equivalent of CMRS because “a service must be a substitute (in the strict economic sense) for a CMRS service” and that the “Commission

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<sup>19</sup> 47 C.F.R. § 20.9(a)(14)(B). This regulation was adopted after the enactment of Section 332, pursuant to the directive in Section 332(d)(3) that functional equivalence would be “as specified by regulation by the Commission.”

<sup>20</sup> While Section 20.9(a)(14)(B) of the Commission’s rules provides a test for functional equivalence, the Commission need not be forever bound by this rule in every new situation. The test was adopted in the context of end user services and not with an eye towards carrier-to-carrier services, such as those offered in the data roaming context. Further, the rule itself does not necessarily limit the inquiry to economic substitution. Section 20.9(a)(14)(B) provides that “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 ... .” This clearly provides the Commission with adequate flexibility to consider that, in the case of a service such as data roaming, other factors such as the technical similarity of the functions performed and the use of common facilities make data roaming the functional equivalent of CMRS. However, even if the Commission feels constrained to look solely to the economic substitutability of data for voice services, as demonstrated within data roaming is the functional equivalent of CMRS.

has properly insisted on rigorous, empirical evidence that changes in price ‘would prompt customers to change from one service to the other.’”

A simple common sense example demonstrates that interconnected mobile voice services (which are CMRS) and non-interconnected mobile data services meet the factors illustrated in Section 20.9(a)(14)(B). Consider a wireless end-user who wants to make a dinner reservation at a particular restaurant. The user can place a mobile voice call to the restaurant to make a reservation, or can use the wireless device to go on-line and make a reservation via the Internet.<sup>21</sup> In this example, the two services are not merely “closely substitutable,” they are near perfect substitutes. This completely disproves the AT&T claim that voice and data roaming are “mutually exclusive” and “obviously are not substitutes.”<sup>22</sup>

AT&T also is incorrect in contending that data services and voice services are not “economic substitutes” for one another such that a user would replace one service with the other based upon price. Returning to the prior example, the mobile user seeking to place a reservation at a restaurant certainly might choose one communication method over the other based upon the relative costs. If, for example, the user had an unlimited usage voice plan and a price-per-bit data plan, he or she could well opt for the more economical substitute – in this example, the voice call – to get the desired information. This consumer behavior provides a clear example of consumer demand moving between two substitutable services based on differences in price.

Other familiar examples exist as well. For instance, many customers use social networking sites, such as Facebook, as substitutes for voice calls or even text messaging. In the past, subscribers might have had no choice but to call or send a text message to friends in order to let them know what they are doing or where they are going. Now, broadband data subscribers have the option of merely updating their status or location on Facebook. Again, cost could play a determinative role in this substitution. A subscriber might have to place numerous calls or send multiple text messages to disseminate this information to all concerned, whereas a single Facebook update could prove to be more economical by simultaneously alerting all “friends” with access to the status and location sections of the sender’s Facebook page. Similarly, data applications such as Loopt allow subscribers

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<sup>21</sup> Indeed, there are applications for the iPhone, such as Open Table, which do exactly this. The user indicates the restaurant the customer is seeking a reservation and the application negotiates via the Internet with the restaurant to establish a reservation.

<sup>22</sup> AT&T Letter, p. 6.

to use their data services to find out where their friends are, to share their location and to meet up. If data services costs were to rise relative to the cost of voice services, these customers would opt to use voice services instead, and *vice versa*.

Notably, these common sense examples also comports with evidence the Commission itself has gathered and reported. In its recent *Fourteenth Wireless Competition Report*,<sup>23</sup> 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.”<sup>24</sup> The same report found 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.”<sup>25</sup> This is precisely the kind of empirical evidence that AT&T mistakenly claims is missing.<sup>26</sup>

The only argument AT&T musters to counter this clear finding of substitutability is its claim that data roaming is a “wholesale service, not a retail service, and therefore arguments that retail voice and data services have become functionally equivalent are irrelevant.”<sup>27</sup> This is nonsense and flies directly in the face of the Commission’s express recognition, when it adopted the functional equivalence definition, that “[o]ur principal inquiry will involve evaluating consumer demand for the service . . . .”<sup>28</sup> The Commission previously has declined to find, based on the arguments made by AT&T and Verizon, a separate market for wholesale services.<sup>29</sup> And,

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<sup>23</sup> *Implementation of Section 6002 (b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Federal Communications Commission, Fourteenth Report, WT Docket No. 09-66 (rel. May 20, 2010) (“*Fourteenth Report*”).

<sup>24</sup> *Id.* at ¶ 4.

<sup>25</sup> *Id.* at ¶ 8.

<sup>26</sup> In addition, voice over Internet Protocol (“VoIP”) is fast becoming a substitute for interconnected voice services. When these services are offered by third-parties, they are transmitting data via mobile data services.

<sup>27</sup> AT&T Letter, p. 5.

<sup>28</sup> *Implementation of Sections 3(n) and 332 of the Commc’ns Act; Regulatory Treatment of Mobile Servs.*, 9 FCC Rcd. 1411, ¶ 80 (1994) (“*1994 Regulatory Treatment Order*”).

<sup>29</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, ¶ 13 (2007) (stating that “competition in the retail market is sufficient to protect consumers against potential harm arising from intercarrier roaming arrangements and practices”). Verizon and AT&T have made similar “single market” arguments in the past. See, e.g., *Joint Opposition to Petitions*

AT&T has offered absolutely no support for its proposition that the functional equivalence test should not be viewed on an end-to-end basis which takes into consideration the extent to which wholesale pricing affects the ultimate consumer. The truth is that there is a direct link between wholesale roamer pricing and retail end-user pricing. Ultimately, higher carrier-to-carrier roaming rates will serve to increase the rates that the home carrier must charge its customers to roam, and these increased end-user prices will affect the consumer's buying decision and the extent to which alternative services are adopted as substitutes.<sup>30</sup>

AT&T also seeks refuge in language from the *1994 Regulatory Treatment Order*<sup>31</sup> to the effect that “very few mobile services that do not meet the definition of CMRS will be a close substitute for a commercial mobile radio service.”<sup>32</sup> This 16 year old prediction was made prior to the birth of the broadband mobile Internet access provider business, and long before the smart phone phenomenon in which mobile devices such as the popular iPhone perform many of the same functions, and are as powerful, as personal computers.<sup>33</sup> The more apt quotation from the *Regulatory Treatment Order* is that the Commission purposefully “broadly interpreted the definitional elements of CMRS because Congress intended this definition to ensure that the Commission regulate similar mobile services in a similar manner.”<sup>34</sup> Much of the record in the data roaming proceeding demonstrates the similarity, both in terms of function and utilization, of voice and data services.<sup>35</sup> Functional equivalence exists as a matter of fact and law.

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*to Deny and Comments of Celco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, WT Docket No. 08-95, at 46 (filed Aug. 19, 2008).*

<sup>30</sup> AT&T also ignores the importance of end user demand on wholesale demand for the same services. If the prices charged for voice and data services are different at the wholesale level, everything else being equal the prices for such services will be different at the retail level as well. Since there is a strong causal link between the end user service and the wholesale roaming service, the demand must be looked at from the end user perspective.

<sup>31</sup> See *1994 Regulatory Treatment Order*.

<sup>32</sup> AT&T Letter, p. 5 (citing *1994 Regulatory Treatment Order* at ¶ 79).

<sup>33</sup> Indeed, between the Apple App Store and the Android Market, there are over 400,000 applications available to consumers. Many of these applications make voice and data more substitutable.

<sup>34</sup> *1994 Regulatory Treatment Order* at ¶ 79.

<sup>35</sup> And, in fact, this substitutability will increase as wireless data devices become equipped with greater data capabilities. In 1994, wireless data consisted of cellular digital packet data (“CDPD”), which was the equivalent of a slow dial-up connection. Today, wireless data can be transmitted at speeds 50-100 times as fast as CDPD.

AT&T submits that the Commission's precedents establish a "stringent standard for determining whether a service is the 'functional equivalent' of a CMRS service."<sup>36</sup> This is not true. To the contrary, the Commission has indicated that:

There is no established test for determining the "functional equivalent" of a CMRS provider. However, the Commission considers several factors, including, but not limited to, such things as: evaluating consumer demand for the services and identifying the target market for the service.<sup>37</sup>

On these dual criteria – consumer demand and the target market – AT&T is hard pressed to claim that data services and voice services are not functional equivalents from an end user perspective. Clear evidence of this comes from AT&T's recent report of the highlights of its third-quarter results. In its own press release, AT&T trumpets the fact that it activated more than 8 million post-paid "integrated devices" – *i.e.*, handsets with QWERTY or virtual keyboards in addition to voice functionality.<sup>38</sup> In its earnings call, AT&T's Chief Executive boasted that "more than 80 percent of phone sales in the quarter were advanced devices used for wireless data services, which cost extra, and about 43 percent of consumers have yet to buy such devices."<sup>39</sup> In other words, AT&T purposefully is targeting customers with voice-only products and getting them to upgrade to integrated devices that will enable them, on a real time basis, to choose between voice and data functionality. No doubt this choice will be made on many occasions based upon the comparative price of the two services.

The functional equivalence argument is particularly inarguable in the 4G context. MetroPCS has rolled out broadband data services using LTE in multiple markets, and is moving toward voice over LTE (or VoLTE). At that point, the two services will be riding over the same networks and using the same equipment and core technology, as one service (voice) gets

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<sup>36</sup> AT&T Letter, p. 5.

<sup>37</sup> *Information for Part 90 Licensees subject to Reclassification as Commercial Mobile Radio Service Providers*, Public Notice, 11 FCC Rcd 9267 (WTB 1996).

<sup>38</sup> See AT&T Press Release, *Record Wireless Sales, Strong Revenue and Earnings Growth Highlight AT&T's Third-Quarter Results*, found at <http://www.att.com/gen/press-room?pid=18677&cdvn=news&newsarticleid=31312&mapcode=financial>.

<sup>39</sup> See Sinead Carew, "AT&T Revenue Beats Street, Promises More Growth," Reuters (Oct. 21, 2010), available at <http://www.reuters.com/article/idUSN2112887620101021>.

substituted for another service (data) in real time.<sup>40</sup> But, the process of substitution is equally applicable in the 3G context, as demonstrated by the example of the wireless user seeking restaurant information which today occurs on 3G systems.<sup>41</sup> Just as the Commission earlier decided that the consumer's automatic voice roaming experience should not be disrupted based upon the hyper-technical distinction of whether the roamer happened to be "in-market" or out-of-market, the consumer's automatic data roaming experience should not be affected by whether the consumer happens to be a 4G or a 3G customer. If, as is the case, 4G voice and 4G data are substitutes for one another, and if 4G data and 3G data are substitutes for one another (which they are), then all of these related services may properly be deemed substitutes, and functional equivalence must be found.<sup>42</sup>

Lastly, as MetroPCS previously advocated,<sup>43</sup> the Commission should take the same sound approach it took with respect to SMS services in the *2007 Roaming Order*.<sup>44</sup> 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 were

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<sup>40</sup> Indeed, the two types of traffic will be managed and prioritized together.

<sup>41</sup> Indeed, OpenTable, Inc., a leading provider of on-line restaurant reservations, reported third quarter 2010 results that it had seated diners totaling 15.4 million, serviced over 13,000 restaurants, and had quarterly revenue of \$23.0 million.

<sup>42</sup> AT&T also asserts that, "with respect to the question of whether mobile wireless service can be treated as common carriage, Congress has specified in Section 332(c) that it is the CMRS/PMRS dichotomy that is controlling, not the telecommunications service definition." AT&T Letter, p. 3. This assertion misses the point in multiple respects. First, as is demonstrated above, the Commission has ample legal authority to regulate data roaming as a functional equivalent of CMRS and thus there is nothing about the CMRS/PMRS dichotomy that acts as a bar. Moreover, the CMRS/PMRS dichotomy is not "controlling" in the sense it displaces the equally important telecommunications service/information service dichotomy. Data roaming remains, at its core, a discrete severable telecommunications service, not an information service. Regardless of whether a service is treated by the Commission as CMRS, the functional equivalent of CMRS, or PMRS, the Commission still would need to determine whether the service is a telecommunications service or an information service in order to establish an appropriate regulatory scheme under its long standing precedent. And, indeed, Verizon Wireless recognizes that the inquiry does not end with the PMRS/CMRS categorization. *Verizon Ex Parte*, Nov. 8, 2010 at 10-11. Here, data roaming is a telecommunications service and regulation is appropriate. Were it a fully integrated non-severable information service, the well-settled policy of avoiding regulating of the Internet would control. Put another way, the CMRS/PMRS and telecommunications service/information service dichotomies both remain relevant.

<sup>43</sup> MetroPCS Reply Comments at 26.

<sup>44</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817, ¶ 25 (2007) ("2007 Roaming Order").

considered to be functionally equivalent and substitutable. Here, since common facilities are being used to perform comparable functions, requiring the provision of data roaming regulation upon just and reasonable terms is appropriate even in instances where the facilities are sending packets of information not destined for the PSTN.<sup>45</sup>

## **II. The FCC Can Impose Roaming Requirements on a PMRS Carrier**

Even if the Commission opts to treat data roaming as PMRS and not the functional equivalent of CMRS, the Commission still has ample authority to regulate data roaming, as AT&T misreads the plain meaning of the statute when it argues that the proposed data roaming regulations would result in its being “treated as a common carrier” in contravention of Section 332(c)(2).

### **A. AT&T Misunderstands What it Means to be “Treated as a Common Carrier”**

AT&T claims that “the proposed data roaming rules . . . would impose quintessential common carrier obligations on wireless broadband providers”<sup>46</sup> in violation of Section 332(c). This argument contravenes the plain meaning of the statute. It is well-settled that the “first traditional tool of statutory construction focuses on the language of the statute.”<sup>47</sup> And, the meaning of a particular statutory provision depends upon “its use in the context of the statute as a whole.”<sup>48</sup> Whenever the task is to understand “the relationship between two different provisions within the same statute” the decisionmaker “must analyze the language of each to make sense of the whole.”<sup>49</sup>

Applying these well-settled principles to the situation at hand, the Commission must read Section 332(c)(3) of the Act (Non-Common Carrier

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<sup>45</sup> AT&T also disagrees that the designation it makes in its license application is not controlling here. However, AT&T fails to point out that it had a choice of checking all applicable services and chose to check only the CMRS box. Indeed, under Item 41, the instructions clearly state that the applicant shall “Enter all types of radio service offering that apply. . . .” AT&T should not now be heard to argue that its designation is of no consequence.

<sup>46</sup> AT&T Letter, p. 1.

<sup>47</sup> *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (citing *Bailey v. US*, 516 U.S. 137, 144 (1995)).

<sup>48</sup> *Bell Atlantic*, 131 F.3d at 1045; *see also Bailey, supra*, 516 U.S. at 145 (“the meaning of statutory language, plain or not, depends on context.”) (citing *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

<sup>49</sup> *Bell Atlantic*, 131 F.3d at 1047.

Treatment of Private Mobile Services) in conjunction with Section 332(c)(2) (Common Carrier Treatment of Commercial Mobile Services). The former provision (Section 332(c)(2)) provides, in relevant part:

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.

The latter provision (Section 332(c)(1)) provides, in relevant part:

A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this Act, *except for such provisions of Title II as the Commission may specify by regulation as inapplicable to that service or person.* (emphasis added).

According to AT&T, Sections 332(c)(1) and (c)(2) create two non-overlapping categories of “mobile service” that occupy the entire field.<sup>50</sup> Under AT&T’s theory, a particular service can be one or the other; not both. This being the case, it follows that Sections 332(c)(1) and (c)(2) must be read in conjunction with one another in order to understand and appreciate what is means for a “private” service provider not to be treated as a common carrier, and for a CMRS provider to be treated as a common carrier. The key language – which not surprisingly is never quoted in the AT&T Letter, is the above-italicized language in Section 332(c)(1). The “except for” clause in Section 332(c)(1) makes clear that “treatment as a common carrier” specifically means regulation under Title II of the Communications Act. In particular, the use of the word “such” (“shall . . . be treated as a common carrier . . . except for *such* provisions of Title II”) clearly indicates that treatment as a common carrier means being subject to Title II. Thus, when Sections 332(c)(1) and 332(c)(2) are read together within their proper context – which established rules of statutory construction require – the only thing Section 332(c)(2) prohibits is subjecting private mobile carriers directly to the provisions of Title II of the Act.

Notably, this is neither a new nor a radical proposition. As pointed out in the AT&T Letter, MetroPCS previously advocated that Section

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<sup>50</sup> AT&T’s position is not accurate as there is a third category of service – a service which is the functional equivalent of CMRS services.

332(c)(2) “merely means that a PMRS provider cannot be subjected to ‘the entire panoply of Title II common carrier regulation.’” While AT&T seeks to dismiss this point,<sup>51</sup> the plain meaning of the statute must prevail. Notably, Title II of the Act is captioned “Common Carriers” and Part I of Title II is specifically entitled “Common Carrier Regulation.” Given these clear designations, the common sense interpretation of Section 332(c)(2), which interpretation would be entitled to *Chevron* deference,<sup>52</sup> is that PMRS carriers cannot be made directly subject to the provisions of Part I of Title II of the Act. As long as the Commission adopts its automatic data roaming regulations pursuant to statutory authority other than Title II, which the Commission has ample authority to do as demonstrated below, the admonition not to treat a private mobile service provider as a common carrier is met.

The legislative history of Section 332 supports the view that treatment as a common carrier was meant by Congress to refer to being subject to the regulations promulgated under Title II of the Act.<sup>53</sup> For instance, the House Report for Budget Reconciliation Act (in which Title III was enacted), states that:

The rates charged by common carrier licensees are subject to the requirements of title II of the Communications Act...Private carriers, by contract, are statutorily exempt from title II of the Communications Act...<sup>54</sup>

This language supports the view that exempting treatment as a common carrier merely was intended to shield them from historical common carrier regulation promulgated under Title II. There is no subsequent legislative history as the various versions of the statutory language were reconciled to indicate that the statutory provision in its final form had any other intent.

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<sup>51</sup> AT&T Letter, p. 3.

<sup>52</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>53</sup> The Commission need not resort to a review of the legislative history since the meaning of the statute can easily be discerned from the language itself. See *United States v. Lewis*, 67 F3d 225, 228 (9th Cir 1995) (“If the language of the statute is unambiguous, the court should look no further in ascertaining its meaning”); see also, *Direct TV Inc. V. Barozenski*, 604 F3d 1004 (2010) (Legislative History comes into play only when necessary to decode an ambiguous enactment; it is not necessary to enforce a straightforward text.). However, it is instructive to note that the legislative history supports the interpretation advocated by MetroPCS.

<sup>54</sup> H.R. REP. NO. 103-111, at 260 (1993), reprinted in 1993 U.S.C.C.A.N. 1,587.

In this case, the Commission has ample authority to adopt a meaningful automatic data roaming proposal without resort to Title II. Section 332(a) of the Act, which specifically pertains to private mobile services, provides:

(a) In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, *consistent with Section 1 of this Act*, whether such actions will –

- (1) promote the safety of life and property;
- (2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;
- (3) encourage competition and provide services to the largest feasible number of users; or
- (4) increase interservice sharing opportunities between private mobile services and other services. (*emphasis added*).<sup>55</sup>

There are two highly significant aspects of this provision. First, Section 332(a) contains an explicit requirement that private mobile service regulations be “consistent with Section 1 of this Act.” Section 1 in turn provides, *inter alia*, that Commission regulations foster a “rapid, efficient, *nation-wide . . . radio communication service . . . at reasonable charges.*” (*emphasis added*) This express application of Title I to the regulation of PMRS clearly empowers the Commission to require wireless carriers to provide automatic roaming service upon request to technically compatible data roamers on reasonable, non-discriminatory terms and conditions. Otherwise, the reference to Title I in Section 332(a) would have no meaning. Since every word of a statute must be given meaning<sup>56</sup> and the statute must be read so as to avoid conflicts,<sup>57</sup> the reference to Title I in Section 332(a) must mean that the Commission regulations must promote radio

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<sup>55</sup> 47 U.S.C. § 332(a).

<sup>56</sup> *United States v. Campos-Serrano*, 404 U.S. 293, 301, n.14 (1971) (holding that “a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant”) (citing *Mkt. Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879)).

<sup>57</sup> *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (holding that a judicial body “must read [two allegedly conflicting] statutes to give effect to each if [it] can do so while preserving their sense and purpose”).

communications service at reasonable charges. Contrary to the claims of AT&T, such a requirement would not be a “quintessential common carrier regulation,” but rather would be permissible Title III and Title I regulation of a private mobile service.

Second, Section 332(a) gives the Commission broad latitude to manage the use of spectrum used by PMRS providers to: (i) encourage competition; (ii) provide services to the largest feasible number of users; and, (iii) improve the efficiency of spectrum use. Clearly, automatic data roaming obligations – which enable smaller and mid-tier carriers to compete for customers against dominant national carriers, which in turn enable data roaming customers to secure service outside of their home markets, and which also improve the efficient use of spectrum by avoiding the wasteful duplication of facilities – fall well within these statutory requirements.

MetroPCS previously argued that AT&T and Verizon Wireless should be estopped from claiming they are PMRS carriers because they have checked only the “common carrier” box in Item 41 of various FCC Form 601 applications.<sup>58</sup> AT&T claims that it “checked the correct box” because the instructions to the FCC Form 601 indicate that “telecommunications carriers should select common carrier on this form.”<sup>59</sup> But the instructions do not say that telecommunications carriers should check *only* the common carrier box. To the contrary, they specifically indicate that applicants should “[e]nter all types of radio service offerings that apply.” No doubt recognizing this hole in its argument, AT&T contends that “there is no box for CMRS, PMRS or anything else of relevance of to this proceeding. This is nonsense. The entire basis of the AT&T argument is that PMRS is a non-common carrier service, and one of the boxes on the FCC Form 601 is “Non-Common Carrier Service.” Had AT&T indicated that it was providing *both* Common Carrier and Non-Common Carrier services, it would then have been entitled to seek comfort in the instruction that “[a] telecommunications carrier shall be treated as a common carrier under the Communications Act and the Commission's Rules (i.e., as an entity which holds itself out for hire indiscriminately, in interstate or foreign communications by wire or radio, or in interstate or foreign radio transmission of energy, for the purpose of carrying transmissions provided by the customer), only to the extent that it is engaged in providing telecommunications services.” Having failed to claim status as Non-Common Carriers, AT&T and Verizon should indeed be estopped from

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<sup>58</sup> MetroPCS Comments at 28-29.

<sup>59</sup> AT&T Letter at 9.

now claiming that their data roaming services are being offered on a non-common carrier basis.<sup>60</sup>

### **B. AT&T Can Find No Comfort in the *Midwest Video* Case**

AT&T claims that the Supreme Court decision in the *Midwest Video* case<sup>61</sup> is “instructive.”<sup>62</sup> This decision, however, does not support, let alone compel, the outcome AT&T is seeking. In *Midwest Video*, the Court was considering rules promulgated by the FCC requiring cable systems that had 3,500 or more subscribers to develop, at a minimum, a 20 channel capacity and to make certain channels available for access by public, educational, local governmental and leased access users, and to furnish equipment and facilities for access purposes. Under the rules, cable systems were required to hold out dedicated channels on a first-come, non-discriminatory basis, cable operators were prohibited from determining or influencing the content of the programming on the access channels, and the permissible charges for access and use of the access equipment were delineated. At the time that the Supreme Court was considering this case, the FCC had no express authority in the Communications Act to regulate cable systems, and, as a result, all cable regulations had to be deemed “reasonably ancillary to the Commission’s jurisdiction over broadcasting.”<sup>63</sup>

In deciding the case, the Supreme Court noted the outright rejection by Congress of a broad right of public access on a first-come, first-served common carrier basis to broadcast stations, and concluded that the Commission’s circumscribed ancillary jurisdiction over cable systems did not allow it to adopt expansive cable access regulations that would not have been lawful if applied to television broadcasters over which the FCC had explicit statutory authority. In reaching this result, the Court specifically emphasized that “[u]nder the rules, cable operators are deprived of all discretion regarding who may exploit their access channels.”<sup>64</sup>

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<sup>60</sup> The instructions to the FCC Form 601 also further rebut the AT&T contention as to what it means to be “treated as a common carrier.” The instruction on Item 41 specifically defines a “common carrier” as “an entity which holds itself out for hire indiscriminately, in interstate or foreign communications by wire or radio, or in interstate or foreign radio transmission of energy, for the purpose of carrying transmissions provided by the customer.” Notably absent from this definition is any mention of non-discrimination or just and reasonable rates, which AT&T claims to be the “*sine qua non*” of common carrier regulation.

<sup>61</sup> *FCC v. Midwest Video*, 440 U.S. 689 (1979).

<sup>62</sup> AT&T Letter, p. 2.

<sup>63</sup> *Midwest Video*, 440 U.S. at 695.

<sup>64</sup> *Id.* at. 693.

There are many material differences between the circumstances in *Midwest Video* and those here which make the Supreme Court's decision of no relevance:

- The FCC has explicit statutory authority under Section 332(a) of the Act to regulate PMRS; it had no such express authority to regulate cable services at the time of the *Midwest Video* decision;
- The Communications Act contains a definition of “common carrier” and provides that “a person engaged in radio broadcasting [which includes television broadcasting] shall not . . . be *deemed* a common carrier.”<sup>65</sup> In contrast, Section 332(c)(3) of the Act provides that a private mobile service provider shall not be “treated as” a common carrier. The language differences between these two sections, though subtle, are material. As earlier discussed, the phrase “treated as a common carrier,” read within its proper context, means that a private mobile service carrier shall not be regulated under Title II of the Act;
- Even if the Commission decided to look to the *Midwest Video* case to ascertain the “quintessential features of common carrier service,” as it is invited to do by AT&T,<sup>66</sup> the proposed data roaming obligation would not and does not constitute common carrier regulation. The Supreme Court expressly emphasized that a “common carrier ‘does not make individualized decisions, in particular cases, whether and on what terms to deal’”<sup>67</sup> and that “all members of the public who choose to employ such facilities may” do so.<sup>68</sup> In contrast, data roaming is a carrier-to-carrier service in which the roaming partner only is required to serve the limited universe of end-users who are subscribed to the services of a home carrier with which the roaming partner has entered into a voluntary roaming agreement and which have compatible equipment, and the roaming partner is free to make individualized decisions (within the bounds of reasonableness) regarding the terms of service;

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<sup>65</sup> 47 U.S.C. § 153(10).

<sup>66</sup> AT&T Letter, p. 2-3.

<sup>67</sup> *Midwest Video*, 440 U.S. at 701 (citing *National Association of Regulatory Commissioners v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976)).

<sup>68</sup> *Id.*

- In *Midwest Video*, the Supreme Court drew a distinction between the impermissible program access rules and the permissible fairness doctrine regulations which required a broadcaster to air contrasting views regarding controversial matters of public interest.<sup>69</sup> While the Fairness Doctrine can certainly be viewed as a broad non-discrimination requirement, it was not deemed to be tantamount to common carrier regulation because the licensee retained discretion and judgment on how to go about fulfilling the obligation. Using this analytical framework, the data roaming rule that MetroPCS is seeking is more akin to the permissible Fairness Doctrine rules than to the impermissible cable program access rules.

Thus, in sum, even if the Commission accepts the AT&T invitation to rely upon the *Midwest Video* precedent, which it should not, that case does not stand as a precedential ban to implementing a meaningful automatic data roaming obligation requiring carriers to provide service to technologically compatible roamers who are customers of a home carrier with which the serving carrier has entered into a roaming agreement upon request on reasonable, non-discriminatory terms and conditions even if the Commission concludes that data roaming is PMRS and not the functional equivalent of CMRS.

Developments in cable television regulation subsequent to the *Midwest Video* case, confirm that a regulatory requirement to avoid discrimination and maintain reasonable rates is not tantamount to common carrier regulation. After the decision in *Midwest Video* was rendered, the Commission was granted explicit statutory authority over cable television by Congress.<sup>70</sup> In doing so, Congress specifically provided that “[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.”<sup>71</sup> Nonetheless, the Commission was granted authority over cable rates,<sup>72</sup> including authority to “ensure that rates for the basic service tier are reasonable,”<sup>73</sup> and to adopt rules “prohibiting discrimination among subscribers and potential subscribers to cable service.”<sup>74</sup> The only way that these provisions can be reconciled with the ban on common carrier regulation is by concluding that rules requiring

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<sup>69</sup> See *Midwest Video*, 440 U.S. at 705, n.14 (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)).

<sup>70</sup> See Cable Communications Policy Act of 1984, Public Law 98-549, 918 stat. 2780 Oct. 30, 1984.

<sup>71</sup> Communications Act, § 621(c), 47 U.S.C. § 541(d).

<sup>72</sup> See *Id.* at § 623, 47 U.S.C. § 543.

<sup>73</sup> *Id.* at § 623(b)(1), 47 U.S.C. § 543(b)(1).

<sup>74</sup> *Id.* at § 623(e)(1), 47 U.S.C. § 543(e)(1).

reasonable rates and non-discrimination are not, as claimed by AT&T, “quintessential features of common carriage.” Properly viewed, the *sine qua non* of being treated as a common carrier is to be subject to the statutory provisions in Title II.<sup>75</sup>

**C. Regulations Requiring Service on a Just, Reasonable and Nondiscriminatory Basis are Often Found Outside of the Common Carrier Context and Have Been Found Not to Constitute Common Carrier Regulation**

AT&T’s claim that requiring data roaming to be provided on just, reasonable and non-discriminatory terms would be “quintessential” treatment as a common carrier is completely undermined by examples outside of the telecommunications industry. As the Commission knows well, the concept of common carriage arose before electronic communications by wire or radio. Thus, the Commission can and should look to other industries to ascertain the essence of common carrier regulation.<sup>76</sup> For example, in the early 1900s, parties were not concerned about access to telecommunications facilities, they were concerned about access to stockyards. It was clear at the time that stockyards were “private” enterprises, not “common carriers.”<sup>77</sup> Despite this recognized private status, Congress enacted, and courts upheld, legislation requiring that “[a]ll rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be *just, reasonable, and nondiscriminatory*.”<sup>78</sup> In *Cotting v. Kansas City Stockyards Co.* the Supreme Court expressly found that a stockyards corporation “while not a common carrier,

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<sup>75</sup> AT&T has committed an error in logic. It is correct to state that common carriers are subject to certain requirements, including those mandating non-discrimination and just and reasonable rates. It is incorrect to state that every entity that is subject to requirements mandating non-discrimination and just and reasonable rates is a common carrier. *See* discussion, *infra*, at Section II.C.

<sup>76</sup> This is especially the case since the definitions of common carrier in the Act and the Commission’s regulations are circular. *See, e.g.*, Section 3(10) “the term ‘common carrier’ ... means any person engaged as a common carrier ...” *See Midwest Video*, 440 U.S. 689 at n. 10 (noting the circularity).

<sup>77</sup> *Nebbia v. New York*, 291 U.S. 536 (1934) (stating that “[a] stockyards corporation...[is] ‘not a common carrier’”).

<sup>78</sup> 7 U.S.C. § 206 (emphasis added). Similarly, “[a]ll stockyard services furnished pursuant to a reasonable request made to a stockyard owner or market agency at such stockyard shall be reasonable and nondiscriminatory and stockyard services which are furnished shall not be refused on any basis that is unreasonable or unjustly discriminatory.” 7 U.S.C. § 205. This also shows that a requirement that a service not be provided on an unreasonable or unjustly discriminatory basis does not constitute common carrier regulation *per se*. Simply put, the best approach is to conclude that common carrier in the telecommunications industry means to be subject to Title II regulation, and nothing more. *See* discussion *supra* at Section II.A.

nor engaged in any distinctively public employment, is doing a work in which the public has an interest,” and its charges may therefore be controlled by regulation.<sup>79</sup> This example makes clear that, contrary to the claim of AT&T, regulations requiring services to be offered on just, reasonable and non-discriminatory terms are *not* tantamount to common carrier regulation: private carriers also may be required to operate in such a matter without any change in their private carrier status.

Judicial decisions in the freight industry – another industry that contains both common carriers and private carriers – further “show that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices.”<sup>80</sup> In *Stephenson v. Binford*, the Supreme Court held that “[p]rivate contract carriers, who do not operate under a franchise and have no monopoly of the carriage of goods or passengers, may” still be subjected to rate regulation similar to that of common carriers.<sup>81</sup> These decisions fully rebut the AT&T view that a private carrier would be impermissibly treated as a common carrier if it is required to provide service at just, reasonable and non-discriminatory rates. The inescapable conclusion is that AT&T errs in asserting that the requirement that carriers provide data roaming upon reasonable request and on just and reasonable terms and conditions is fundamentally incompatible with a Commission designation of data roaming services as PMRS.<sup>82</sup>

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<sup>79</sup> *Cotting v. Kansas City Stockyards Co.*, 183 U.S. 79, 84 (1901).

<sup>80</sup> *Nebbia*, 291 U.S. at 535.

<sup>81</sup> *Stephenson v. Binford*, 287 U.S. 251, 274 (1932).

<sup>82</sup> Moreover, another analogy can be found in the concept of FRAND (fair reasonable and nondiscriminatory) within the context of standards setting for essential intellectual property patents. For instance, in mobile wireless telephony, standards are determined privately by industry groups known as standards-determining organizations (“SDOs”). See *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 304 (3d Cir. 2007). In order to prevent the holder of a particular essential patent from exerting undue control over the implementation of industry-wide standards, many SDOs require commitments from vendors whose technologies are included in standards to license their technologies on fair, reasonable, and non-discriminatory terms. See *id.* at 304. This situation, which governs a wide range of standards in the communications industry, is similar to the situation at present, in which Verizon Wireless and AT&T basically have the “essential patent” of nationwide coverage. The patent holders who are compelled by the SDOs to offer licenses on FRAND terms are certainly not considered common carriers - which only adds weight to the MetroPCS argument in which there are other situations in which companies offer licenses upon just and reasonable terms but are not considered common carriers. This further confirms that offered licensing terms that are just and reasonable is not the *sine non qua* of common carriage.

### III. An Automatic Data Roaming Obligation Will Promote Economic Growth and Create Jobs

The *National Broadband Plan* establishes the worthy goal of promoting and enhancing broadband deployment throughout the United States.<sup>83</sup> This important goal is best met by ensuring that there is robust competition in the marketplace, which will spur carriers to extend and improve their networks. Obviously, network enhancements and extensions will require capital investment and create jobs. Notably, the *National Broadband Plan* correctly opined that “[d]ata roaming is important to entry and competition for mobile broadband services.”<sup>84</sup> MetroPCS strongly agrees with this statement – if new entrants and small, rural and mid-tier carriers are allowed automatic data roaming, customers are provided with new choices. These new choices will spur innovation, investment, competition and, in turn, promote and enhance broadband deployment.

Further, as MetroPCS has pointed out on numerous occasions, the voice roaming market became broken when AT&T and Verizon Wireless were allowed to consolidate smaller regional carriers and grow geographically to the point where they no longer had a reciprocal need and economic incentive to enter into roaming agreements on reasonable terms with other carriers, while at the same time consolidating out of existence other carriers which previously were willing to enter into roaming arrangements with small and regional carriers (*e.g.* the Verizon Wireless acquisition of roaming-friendly AllTel). Unfortunately, the data roaming market is starting out at the point where voice roaming market broke down. AT&T and Verizon Wireless are capable of duplicating their voice service footprints to provide data services. Thus, they have no incentive to enter into reasonable arms length agreements with other carriers. This is why the Commission must reject the claim that data is a nascent, emerging market that should go unregulated for the time being. The Commission must recognize that the die has already been cast due to the relative coverage areas of AT&T and Verizon *vis-a-vis* all other carriers. When a carrier can demand \$1/Mbyte for data services when charges to its own end users approach \$0.01/Mbyte,<sup>85</sup> it is clear the carrier is exercising dominant market power. As is discussed below, time is of the essence and the Commission cannot await further evidence of market failure before acting.

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<sup>83</sup> See generally *National Broadband Plan*.

<sup>84</sup> *National Broadband Plan* at 49.

<sup>85</sup> If a typical data user uses 500 Mbytes of data per month and uses 10% of it outside the home territory, the charge would be \$50 for the data roaming alone. Given that most carriers' average revenue per unit is in the neighborhood of \$50/month, such charges would completely consume all of the end user charges for the service.

Automatic wireless data roaming will incent small, rural and mid-tier carriers to invest in their own next-generation networks, such as LTE, confident in the knowledge that their customers will be able to roam and continue to receive their advanced wireless services on reasonable terms. AT&T repeatedly has argued that the market for wireless services is a national one, and the Commission has acknowledged that wireless carriers *must* provide their customers with nationwide service in order to compete effectively in today's CMRS marketplace.<sup>86</sup> If carriers are unable to offer their customers nationwide coverage, they will be unable to compete effectively in their local home marketplace for wireless customers. Eventually, some of these carriers will have no choice but to submit to consolidation into another company. Experience shows that virtually every past merger has resulted in streamlined operations to eliminate duplication as a cost-saving measure. Simply stated: mergers don't promote job growth, they result in substantial job losses.

**IV. Home Carriers Should Not Be Able to Prioritize Their Own Customers Traffic Over Roaming Customers Traffic**

AT&T argues that, if data roaming obligations are imposed, the Commission should allow AT&T to accord priority access to its own customers' traffic over the traffic of a roamer. AT&T suggests that it would suffer crippling congestion on its own network were it to serve roamers on an equal footing, and 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.<sup>87</sup> This AT&T proposal is reminiscent of the approach that incumbent LECs took when they were forced to interconnect with competitive carriers. For years they offered substandard facilities and poor service to interconnecting carriers who were providing competing services. MetroPCS submits that it would be a recipe for disaster for the Commission to endorse a blatantly discriminatory approach of this nature in the data roaming context. The rights of customers to roam would be largely unenforceable if the roaming partner could erect "network congestion" as a defense to a failure to serve. Having seen how strenuously AT&T and Verizon Wireless are opposing data roaming rights, the Commission would have to be deeply concerned that any such prioritization right would incent the roaming partner to avoid building adequate facilities to serve all customers (local and roaming). While MetroPCS understands that a carrier may need at times to adjust network speeds to accommodate periods of heavy demand, any such network management technique should be implemented so as to not discriminate among end users – including those

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<sup>86</sup> 2007 Roaming Order at ¶ 3, 27-28.

<sup>87</sup> AT&T Comments at 10, 61-62.

who are roaming. 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.

Furthermore, as MetroPCS discussed in its reply comments, AT&T seems to be seriously overstating the extent to which data roaming will adversely affect its network. AT&T has not offered any objective evidence that providing roaming to third parties will have a measurable impact on its network congestion over any significant time frame.<sup>88</sup> MetroPCS demonstrated that since AT&T and Verizon control nearly 60% of the wireless subscribers in the United States, data roaming traffic from other carriers would represent no more than a 2-4 percent increase in roaming traffic over existing traffic already transmitting over AT&T's entire network.<sup>89</sup> Thus, any increase in congestion caused by data roaming services to those who do not have it today would be minimal.

In addition, allowing the largest carriers to prioritize their own traffic would result in such carriers' ability to essentially eviscerate the data roaming right. When a consumer is traveling and finds that his or her service is not up to par, they will not blame the carrier providing the roaming service – indeed, the consumer may have no idea what carrier is providing the roaming service. Rather, the consumer will blame his or her home carrier. This will result in customer dissatisfaction that the home carrier will be wholly unable to resolve since the service problem was created by the roaming partner. In effect, prioritization will allow AT&T and Verizon to cause dissatisfaction by customers of their competitors.

The prioritization claim ignores the fact that roaming partners will be entitled to charge a reasonable fee for the provision of roaming services. The proper regulatory solution to network congestion is to enable roaming carriers to recoup enough to maintain network facilities capable of serving all end users desiring service. This would fulfill the purpose of Section 1 of the Act which is to promote “adequate facilities” sufficient to establish a “rapid, efficient, Nation-wide” service. Endorsing discrimination against roamers would not.

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<sup>88</sup> MetroPCS Reply Comments at 56-58.

<sup>89</sup> *Id.* at 56-57.

Marlene H. Dortch  
November 11, 2010  
Page 25

**V. Conclusion**

The Commission has the clear authority to impose reasonable requirements on carriers to provide automatic data roaming; whether such service is classified as either the functional equivalent of CMRS or as PMRS. Further, the public interest will be served by such a requirement.

**Time is of the essence.** The broadband data market is evolving rapidly and the ability of carriers other than AT&T and Verizon Wireless to get and maintain a competitive foothold will be lost if data roaming is not recognized in the near term as a consumer right. The best way for the Commission to promote economic stimulus and job growth is to foster nationwide competition between wireless carriers, to ensure that such carriers are able to compete for consumers on a level playing field. This will allow more carriers to maintain and increase their employment, rather than be forced to be consolidated out of existence.

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

Respectfully submitted,



Carl W. Northrop  
of PAUL, HASTINGS, JANOFSKY & WALKER LLP

cc: (via email)	Christina Clearwater	Charles Mathias
	Patrick DeGraba	Ruth Milkman
	Stacy Ferraro	Paul Murray
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	Nese Guendelsberger	Jim Schlichting
	David Horowitz	Austin Schlick
	Rick Kaplan	Ziaol Sleem
	Andrea Kearney	Peter Trachtenberg
	Chris Killion	Julie Veach

# **Attachment 2**

MetroPCS November 22, 2010 *Ex Parte*  
Response to Verizon Letter

Atlanta  
Beijing  
Brussels  
Chicago  
Frankfurt  
Hong Kong  
London  
Los Angeles  
Milan  
New York  
Orange County  
Palo Alto  
Paris  
San Diego  
San Francisco  
Shanghai  
Tokyo  
Washington, DC

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.<sup>1</sup> 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).<sup>2</sup> Time and time again, Verizon has represented that “the market is working to

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<sup>1</sup> 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.

<sup>2</sup> 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.<sup>3</sup> 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.”<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> MetroPCS falls into this category<sup>7</sup> and expects to find that the list includes other carriers like MetroPCS who are competing head-to-head with Verizon in multiple markets.<sup>8</sup> If so, this information will reinforce

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

<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> 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.”<sup>9</sup>

**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.<sup>10</sup> 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”).<sup>11</sup> 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.”<sup>12</sup> 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.”<sup>13</sup> The statutory language,

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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.

<sup>9</sup> MetroPCS Nov. 11 *Ex Parte*, p. 2.

<sup>10</sup> *Compare* Verizon Letter *with* AT&T Sept. 22 *Ex Parte*.

<sup>11</sup> 47 U.S.C. § 332(c)(2).

<sup>12</sup> Verizon Letter, p. 1, 10.

<sup>13</sup> 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.<sup>14</sup> 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,<sup>15</sup> 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*<sup>16</sup> and *NARUC II*<sup>17</sup> 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.*”<sup>18</sup> Ultimately, the *NARUC I* court upheld the Commission’s determination reasoning that “once the conclusion is reached

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<sup>14</sup> *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.”)

<sup>15</sup> See discussion *infra* at Section I.B.

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

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

<sup>18</sup> *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.*<sup>19</sup> 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,<sup>20</sup> 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*<sup>21</sup> 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.*"<sup>22</sup> 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."<sup>23</sup> 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."<sup>24</sup> Section 332(a) also empowers the Commission to promote "efficiency of spectrum use," "competition," "services to the largest feasible number of users" and

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<sup>19</sup> *Id.*

<sup>20</sup> See discussion *infra* at Section I.D.

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

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

<sup>23</sup> Verizon Letter, p. 1, 14.

<sup>24</sup> 47 U.S.C. § 332(a) and 151.

“interservice sharing”.<sup>25</sup> 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.<sup>26</sup> 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.”<sup>27</sup> It then claims that “[s]uch requirements go to the ‘primary *sine qua non* of common carrier status.’”<sup>28</sup> 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 . . .’”<sup>29</sup> 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.”<sup>30</sup> Similarly, *Midwest Video II*,<sup>31</sup> which also is cited by Verizon,<sup>32</sup> finds the Supreme Court agreeing with the *NARUC II* court that the essence of common carriage is that “[a] common carrier does not ‘make

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<sup>25</sup> 47 U.S.C. § 332(a)(1) through (4).

<sup>26</sup> See discussion *infra* at pp. 10-11.

<sup>27</sup> Verizon Letter, p. 2.

<sup>28</sup> *Id.*

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

<sup>30</sup> *Id.* at 608-609.

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

<sup>32</sup> Verizon Letter, n.5.

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

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*,<sup>34</sup> 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.”<sup>35</sup> The Commission also has made clear repeatedly that “user compatibility is an important consideration for private carriers.”<sup>36</sup> Thus, in *Hughes Communications, Inc.*,<sup>37</sup> the Commission found individualized decisionmaking when the service provider took into consideration “the personal and operational compatibility of a particular applicant.”<sup>38</sup> Another indicator that a service is properly considered to be private is whether the offering carrier treats the underlying service agreement as confidential.<sup>39</sup> 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.”<sup>40</sup>

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

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

<sup>34</sup> 95 FCC 2d 866 (1983).

<sup>35</sup> *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.

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

<sup>37</sup> *Hughes Communications, Inc.*, 90 FCC 2d 1238 (1982).

<sup>38</sup> *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).

<sup>39</sup> *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.

<sup>40</sup> *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*,<sup>41</sup> 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.<sup>42</sup> 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."<sup>43</sup> This meant that it met the *NARUC II* test of making "individualized decisions, whether and on what terms to serve."<sup>44</sup> Here, the

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

<sup>42</sup> *Id.* at 924.

<sup>43</sup> *Id.* at 925.

<sup>44</sup> *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.”<sup>45</sup> 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.”<sup>46</sup> 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.”<sup>47</sup> 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.<sup>48</sup> There simply is no rational basis for

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<sup>45</sup> Verizon Letter, p. 12.

<sup>46</sup> *Id.* at p. 3.

<sup>47</sup> 47 U.S.C. § 332(c)(1).

<sup>48</sup> 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.<sup>49</sup> In light of these differences (which incidentally arise out of the fact that the roaming component of data services is not functionally integrated<sup>50</sup>) the regulation of voice and data roaming services under different statutory provisions and regulatory regimes is not a matter of concern.<sup>51</sup>

### **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.<sup>52</sup> It then largely parrots the AT&T arguments – which MetroPCS already has fully rebutted<sup>53</sup> – 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

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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.

<sup>49</sup> 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.

<sup>50</sup> See discussion *infra* at pp. 12-13.

<sup>51</sup> 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.

<sup>52</sup> Verizon Letter, p. 6-8.

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

roaming.”<sup>54</sup> 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.<sup>55</sup>

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.<sup>56</sup> 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

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<sup>54</sup> Verizon Letter.

<sup>55</sup> 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.

<sup>56</sup> 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.”<sup>57</sup> 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.<sup>58</sup> 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.”<sup>59</sup> 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.”<sup>60</sup> 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).”<sup>61</sup>

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.<sup>62</sup>

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

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<sup>57</sup> Verizon Letter, p. 13.

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

<sup>59</sup> *Id.* at 990.

<sup>60</sup> *Id.* (emphasis added).

<sup>61</sup> *Id.* at 991.

<sup>62</sup> 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.<sup>63</sup> 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.”<sup>64</sup> 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*<sup>65</sup> 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,<sup>66</sup> 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.

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<sup>63</sup> 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.

<sup>64</sup> Verizon Letter, p. 10.

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

<sup>66</sup> 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.<sup>67</sup> 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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