ORAL ARGUMENT REQUESTED

PUBLIC COPY - BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 17-60736

WORLDCALL INTERCONNECT, INCORPORATED,
also known as Evolve Broadband, Complainant

Petitioner,

V.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT REGARDING ORAL ARGUMENT

The respondents believe that oral argument would be helpful to the Court in resolving the issues presented in this case, including the Federal Communications Commission's interpretation of its rules and orders.

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JURISDICTION

The *Order* on review was released on September 7, 2017. *WorldCall Interconnect, Inc. a/k/a Evolve Broadband, Complainant v. AT&T Mobility LLC, Defendant*, 32 FCC Rcd 7144 (2017). Worldcall filed its petition for review of the *Order* on November 2, 2017. This Court's jurisdiction rests on 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

ISSUES PRESENTED

"Roaming" allows consumers to obtain voice and data services on their mobile devices when they travel outside their own wireless provider's

network coverage area, by relying on another wireless provider's network. To facilitate roaming, the Federal Communications Commission (FCC or Commission) has promulgated separate rules for "commercial mobile radio service" (CMRS) (typically voice) roaming, 47 C.F.R. § 20.12(d), and "commercial mobile data service" (data) roaming, 47 C.F.R. § 20.12(e).

In the proceeding below, Worldcall complained that the roaming rates offered by AT&T in contract negotiations violated the agency's rules and orders. The FCC's subordinate Enforcement Bureau (Bureau), acting on delegated authority, determined that the data roaming rule, 47 C.F.R. § 20.12(e), governed Worldcall's roaming request. Applying that rule, and the additional guidance set out by the Commission in three previous orders, the Bureau compared AT&T's proffered rates to those offered by it to other carriers and found that the rates were not unlawful. On review, the Commission affirmed the Bureau's decision.

This case presents the following questions:

1. Whether the Commission reasonably interpreted its own regulations when it held that its data roaming rule, 47 C.F.R. § 20.12(e), applied to Worldcall's roaming dispute with AT&T?

2. Whether the Commission reasonably determined that Worldcall failed to meet its burden of demonstrating that the data roaming rates offered by AT&T were commercially unreasonable?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the Addendum to this brief.

COUNTERSTATEMENT

I. STATUTORY AND REGULATORY BACKGROUND

a. Title III of the Communications Act of 1934, 47 U.S.C. §§ 301 *et seq.* (the Communications Act), provides the FCC broad authority to oversee radio transmission in the United States, including allocating and assigning radio spectrum for spectrum-based services. *Id.* § 301. To that end, various provisions of Section 303 of the Communications Act authorize the Commission, subject to what the "public convenience, interest, or necessity requires," to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class," 47 U.S.C. § 303(b), to "encourage the larger and more effective use of radio in the public interest," *id.* § 303(g), and to "prescribe such restrictions and conditions, not inconsistent with the law, as may be necessary to carry out the provisions of this [Act]." *Id.* § 303(r).

To date, the Commission has exercised its Title III authority to allocate some wireless communications spectrum on a "common carrier" basis. The fundamental distinction between common carrier and non-common carrier services is that the former are provided "indifferently" to all comers, while the latter are provided on the basis of "individualized decisions, in particular cases, whether and on what terms to deal." *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) ("*NARUC I*"). Common carrier services are subject to the obligations in Title II of the Communications Act, 47 U.S.C. § 201 *et seq.* – including the requirement that rates and terms must be just, reasonable, and not unreasonably discriminatory. 47 U.S.C. §§ 201(b), 202(a).

b. The Commission has exercised its Title II and Title III authority to promulgate rules setting forth the "roaming" obligations of wireless service providers. Roaming allows subscribers of one wireless provider to use the network facilities of another "host" provider when using their mobile devices. *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817, 15819 ¶ 5 (2007) (*2007 Order*). For example, roaming might be necessary when a customer who lives in Dallas wishes to access the Internet in New Orleans using her smartphone. Roaming is essential to wireless communications when the subscriber is outside the

geographic reach of her or his provider's wireless towers and other network facilities.

Section 20.12 of the FCC's rules, 47 C.F.R. § 20.12, governs the access of mobile wireless consumers to roaming. That rule establishes separate but complementary roaming regimes for CMRS roaming and data roaming.

CMRS is defined in the Communications Act as a mobile service that is "provided for profit," and "interconnected" to the public switched network – *i.e.*, "[a]vailable to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public." 47 U.S.C. § 332(d)(1); 47 C.F.R. § 20.3. A CMRS carrier, insofar as it is providing CMRS, must be treated as a common carrier. 47 U.S.C. § 332(c)(1). And as a common carrier, the rates and terms of its service must be just, reasonable, and not unreasonably discriminatory. 47 U.S.C. §§ 201(b), 202(a).

"Commercial mobile data service" is defined in the Commission's rules as a for-profit "mobile data service" that is likewise available to the public, but that "is not interconnected with the public switched network." 47 C.F.R. § 20.3. Commercial mobile data service is a broad category that included at the time relevant to this litigation "mobile broadband Internet access service" – a retail service that allows wireless customers to, *inter alia*, surf the web, watch videos, and send email from their mobile devices.

A. CMRS Roaming Rule

In 2007, the FCC imposed a roaming obligation on all CMRS carriers that have the technical capability to offer roaming. *2007 Order* ¶ 2; 47 C.F.R. § 20.12(a)(2).

That obligation, codified in Rule 20.12(d), requires each such CMRS carrier, "[u]pon a reasonable request," to "provide automatic roaming to any technologically compatible, facilities-based CMRS carrier on reasonable and not unreasonably discriminatory terms and conditions, pursuant to Sections 201 and 202 of the Communications Act, 47 U.S.C. § 201 and 202." 47 C.F.R. § 20.12(d); *2007 Order* ¶ 1.[1] A request for CMRS roaming is presumptively reasonable if the requesting carrier's network is technologically compatible with the host's network. *2007 Order* ¶ 33.

When it adopted the CMRS roaming rule, the Commission stated that the new obligation only applies to CMRS carriers when they offer interconnected CMRS service, *2007 Order* ¶¶ 1, 23, and that "as a common carrier obligation," it "does not extend … to services that are not CMRS" – which at that time included non-interconnected "data services." *2007 Order*

[1] The rule refers to "automatic roaming," to distinguish it from an earlier form of roaming (manual roaming) that required consumers to provide billing information (such as a credit card) to the host carrier before they could roam on its network.

¶ 2. Several parties asked that the CMRS roaming obligation also apply to those services, *id.* ¶ 53, but the Commission declined that request, explaining that the record "lack[ed] a clear showing" that to do so would be in the public interest. *Id.* ¶ 56; *id*. ¶ 60. Instead, it sought comment on whether to do so in a future proceeding. *Id.* ¶ 77.

B. Data Roaming Rule

The Commission adopted a separate rule governing roaming for commercial mobile data services in 2011. *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Rcd 5411 (2011) (*Data Roaming Order*), *aff'd*, *Cellco P'ship v. FCC*, 700 F.3d 534 (D.C. Cir. 2012). *See* 47 C.F.R. § 20.12(a)(3), (e).

The data roaming rule generally requires a "facilities-based provider of commercial mobile data services" to "offer roaming arrangements to other such providers on commercially reasonable terms and conditions." 47 C.F.R. § 20.12(e). Among other things, the rule permits such providers to "negotiate the terms of their roaming arrangements on an individualized basis." *Id*. § 20.12(e)(1). In adopting the rule, the Commission emphasized that a data roaming provider is free to insist on any "commercially reasonable" term

or condition for roaming that it thinks appropriate given the "individualized circumstances." *Data Roaming Order* ¶ 45.

When the FCC adopted the *Data Roaming Order*, mobile broadband service was classified as a non-interconnected (non-CMRS) service. Thus, the FCC declined the request of several small wireless carriers to find that data roaming was a common carriage "telecommunications service" subject to Title II of the Communications Act (and in particular the requirement that the rates and charges for that service be just, reasonable, and nondiscriminatory). *Data Roaming Order* ¶ 70; *see* 47 U.S.C. §§ 201(b), 202(a); *Cellco Partnership*, 700 F.3d at 538-39. The FCC determined, however, that it could impose a data roaming obligation under Title III of the Communications Act, which gives the agency broad authority to manage spectrum. *Data Roaming Order* ¶ 62.

The agency emphasized that the data roaming rule (unlike the CMRS roaming rule) did not impose a common carriage obligation, because it "will not require providers to serve all comers indifferently on the same terms and conditions." *Id.* ¶ 68; *NARUC I*, 525 F.2d at 641 (the "essential" aspect "implicit in the common carrier concept is that the carrier 'undertakes to carry

for all people indifferently'"). The D.C. Circuit upheld the validity of the rule on that basis. *Cellco Partnership*, 700 F.3d at 548.[2]

C. Enforcement Of The Roaming Rules

After promulgating the CMRS roaming rule in 2007, the Commission announced that carriers may bring complaints for violation of Rule 20.12(d) pursuant to Section 208 of the Communications Act, 47 U.S.C. § 208, which allows any person to complain "of anything done or omitted to be done by any common carrier" "in contravention of the provisions" in Title II. 47 U.S.C. § 208(a). *See Reexamination of Roaming Obligations of Commercial*

[2] Subsequently, in the *Open Internet Order*, the Commission concluded that mobile broadband Internet access was a form of CMRS. *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, ¶¶ 331, 388 (2015) ("*Open Internet Order*"), *aff'd, United States Telecom Ass'n v. FCC*, 825 F.3d 674 (2016), *pets. for cert. pending*, No. 17-498, 17-499, 17-500, 17-501, 17-502, 17-503, 17-504. The agency recognized that, without more, that determination would subject providers of that service to the CMRS roaming rule. *Open Internet Order* ¶ 525. To avoid disrupting the roaming market, the Commission decided to forbear under 47 U.S.C. § 160 from the application of the CMRS roaming rule to mobile broadband Internet access service providers until it completed a comprehensive review of its roaming rules. *Id.* ¶ 526. The Commission's forbearance was "conditioned on [mobile broadband Internet access service] providers continuing to be subject to the obligations, process, and remedies under the data roaming rule." *Id.* The *Open Internet Order* was reconsidered and reversed by the agency in *Restoring Internet Freedom*, 2018 WL 305638 (released Jan. 4, 2018), pets. for review filed, Nos. 18-1051 *et seq*. (D.C. Cir.); No. 18-70506 & 70510 (9th Cir.), which determined that mobile broadband service is not CMRS, *id*. ¶ 65.

Mobile Services Providers of Mobile Data Services, 25 FCC Rcd 4181, 4201, ¶ 39 (2010) (*2010 Order*). Under the Commission's rules, the agency's Enforcement Bureau has the authority to resolve complaints under Section 208. 47 C.F.R. § 0.111(a)(1).

The Commission likewise delegated authority to the Bureau to resolve complaints arising out of the data roaming rule. Although the complaint procedures for data roaming are "similar" to those for CMRS roaming, data roaming, unlike CMRS roaming, is not governed by Section 208 of the Communications Act. *Data Roaming Order* ¶ 74.

In 2014, the FCC's Wireless Telecommunications Bureau provided further guidance for evaluating the "commercial reasonableness" of data roaming rates. *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 29 FCC Rcd 15483 (WTB 2014) (*2014 Declaratory Ruling*). It clarified that a complainant could "adduce evidence" in any individual case on whether the roaming rates offered by a host "are substantially in excess of retail rates, international rates, and MVNO/resale rates"[3] and could submit "a comparison

[3] Resellers and mobile virtual network operators (MVNOs) do not own any network facilities, but instead purchase mobile wireless services wholesale from facilities-based service providers and resell these services to consumers.

of proffered roaming rates to domestic roaming rates as charged by other providers." *Id*. ¶ 9.

II. FACTUAL BACKGROUND

A. Worldcall's Complaint

Worldcall is a wireless carrier that, among other things, provides wireless broadband Internet access in a predominantly rural area in central Texas. *Worldcall Interconnect, Inc. a/k/a Evolve Broadband, Complainant v. AT&T Mobility LLC, Defendant*, 31 FCC Rcd 3527 (EB 2016) ¶ 7 (*Interim Order*) (JA___). AT&T is a nationwide wireless carrier that holds licenses for, and provides wireless service in, areas that are adjacent to the area covered by Worldcall's license, including Austin, Houston, and San Antonio, Texas. *Id.* ¶ 8 (JA___). Both Worldcall and AT&T have Long Term Evolution ("LTE") networks. *Id.* ¶¶ 7-8 (JA___). LTE is a technology that increases the speed and capacity of wireless data networks. *Id.* n.22 (JA___).

On November 6, 2014, Worldcall filed a complaint against AT&T with the Commission alleging that AT&T refused to enter into a data roaming agreement proposed by Worldcall and instead proposed data roaming rates that violate the agency's rules and orders. Complaint ¶¶ 9, 15-17 (JA___). *See*

Interim Order ¶ 9 (JA __).[4] The Complaint asked the Commission to find that AT&T's proposed rates were neither commercially reasonable nor just and reasonable, and to enter an order directing AT&T to provide data roaming pursuant to the terms of a proposed agreement appended to the Complaint. Complaint ¶¶ 6, 15, 43-44 (JA___). *See Interim Order* ¶ 9 (JA____). Though the Complaint alleged that "the automatic [CMRS] roaming rule" also pertained "in part" to its dispute with AT&T, the agreement only included rates and terms for data roaming. Complaint ¶¶ iii, n.2; *see also id.* at 9 n.50 (JA___). *See Interim Order* n.26 (JA___).

After negotiations between Worldcall and AT&T failed to resolve the dispute, the parties exchanged Best and Final Offers for a roaming agreement; but they remained far apart on terms. *Id.* ¶ 10 (JA___). They subsequently filed briefs addressing the disputed issues. *Id.*

[4] Worldcall filed its original Complaint on September 8, 2014, and an Amended Complaint on October 1, 2014, which it further amended and re-filed on November 6, 2014. *Interim Order* n.24 (JA___). The *Interim Order* addressed the November 6, 2014 Complaint, which is referred to as the "Complaint" in this brief.

B. The *Interim Order*

After reviewing the specific terms proposed in the parties' Final Offers, and their briefs, the Enforcement Bureau issued an interim order denying portions of Worldcall's Complaint. *Id.* ¶ 1 (JA___).

The Bureau analyzed Worldcall's Complaint under its data roaming rule, 47 C.F.R. § 20.12(e). Though Worldcall's final offer also referred to [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] the Bureau analyzed the Complaint under the data roaming rule (Rule 20.12(e)), and not the CMRS roaming rule (Rule 20.12(d)). *Id.* n.49 (JA___).

[5] [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]

Applying Rule 20.12(e), the Bureau found that Worldcall had not demonstrated that AT&T's proposed data roaming rates were commercially unreasonable. *Id.* ¶¶ 1, 28 (JA___). Following the guidelines in the *Data Roaming Order* and the *2014 Declaratory Ruling*, the Bureau looked to AT&T's agreements with other roaming partners. *Id*. ¶ 23 (JA___) (citing *Data Roaming Order* ¶ 86 & *2014 Declaratory Ruling* ¶ 16). The record showed that [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] *Interim Order* ¶ 22 (JA___). The Bureau acknowledged that [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] but explained that the data roaming rule does not require AT&T to offer Worldcall its "best rate." *Id*. ¶ 23 (JA___). Instead, that rule "give[s] providers leeway to determine what rates to offer so long as they fall within a 'general requirement of reasonableness.'" *Id*. (citing *Data Roaming Order* ¶¶ 21, 33, 81).

The Bureau found no merit in Worldcall's assertion that [BEGIN CONFIDENTIAL] [redacted]

[redacted] [END CONFIDENTIAL]

The Bureau also was not persuaded that a comparison to AT&T's retail rates showed that the proffered data roaming rates were too high to be commercially reasonable. Noting that the Commission had declined to employ retail rates to cap roaming rates, the Bureau held that roaming rates do not have to be comparable to or less than a provider's retail rates. *Id.* ¶ 26 (JA___); *see 2014 Declaratory Ruling* ¶ 18 (explaining that retail rates "are merely reference points" that "do not function as a ceiling or as a cap on prices"). Instead, only data roaming rates that are "'substantially in excess of

retail rates'" are "'potentially relevant.'" *Id*. (citing *2014 Declaratory Ruling* ¶ 9). Worldcall, the Bureau held, failed to demonstrate such a disparity between AT&T's retail and roaming rates. *Id.*

The Bureau also rejected "[Worldcall's] suggestion that the 'right' data roaming rate will ensure [Worldcall's] ability to compete in the retail market under its current business model." *Id.* n.78 (JA___). It explained that "[Worldcall's] claimed individual inability to compete" did not demonstrate "'competitive harm in a given market,'" which is the relevant consideration. *Id*. (quoting *Data Roaming Order* ¶ 86).

The Bureau accordingly directed Worldcall and AT&T to "resume good faith negotiations of a roaming agreement that is consistent with the guidance" in the order. *Id*. ¶¶ 1, 29 (JA___, ___).

C. The *Division Order*

The parties subsequently executed a roaming agreement that "resolve[d] the remaining issues consistent with the *Interim Order*." *WorldCall Interconnect, Inc. a/k/a Evolve Broadband, Complainant v. AT&T Mobility LLC, Defendant*, 31 FCC Rcd 10531, ¶ 2 (EB 2016) (*Division Order*) (JA___). But they informed the Bureau that they entered into that agreement with the expectation that the rulings in the *Interim Order* would be included in a dispositive order, to allow Worldcall to challenge these rulings.

Id.; *see* 47 U.S.C. § 155(c)(7), *id.* § 405(a). On September 22, 2016, the Bureau issued the *Division Order*, which incorporated and adopted the rulings in the *Interim Order*. *Id.*

D. The *Order* on Review

Worldcall filed an Application for Review (AFR) by the full Commission of the *Division Order*'s adoption of the holdings in the *Interim Order*. *Order* ¶ 1 (JA___). The Commission affirmed the *Division Order*.

First, the Commission held that the Bureau correctly applied the data roaming rule, 47 C.F.R. § 20.12(e), to the rate dispute between Worldcall and AT&T. *Order* ¶ 3 (JA___). It observed that [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] – and that "the parties raised no disagreement over rates for GSM-enabled voice roaming [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] *Id.* The Commission explained that the service provided by the roaming providers determines the rule that establishes its roaming obligations. *Id.* ¶ 4 (JA___). Because Worldcall requested roaming using AT&T's "mobile broadband

Internet access service,"[6] which is a type of commercial mobile data service subject to Rule 20.12(e), the Commission held that the Bureau properly analyzed Worldcall's Complaint under that rule alone. *Id.*

The Commission rejected Worldcall's argument that its roaming request was also governed by the CMRS roaming rule "because of capabilities [Worldcall] will offer its customers" – specifically, "switched voice service." *Order* ¶ 5 (JA___). The Commission stated that when it enacted Rule 20.12(d), it intended that rule's roaming obligation to apply to a host carrier "only 'insofar as [the host] is engaged' in the provision of CMRS, text messaging, and push-to-talk." *Id*. ¶ 6 (JA___) (quoting 47 U.S.C. § 332(c)(1)(A)). And Worldcall concededly requested a roaming service that was *not* CMRS. *Id.* ¶ 4 (JA___) (citing Worldcall AFR at 10 (JA___)). The Commission clarified, however, that its ruling "does not exempt LTE networks" from the CMRS roaming rule, stating that "if a host provider offers

[6] "Mobile broadband Internet access service" is "[a] broadband Internet access service that serves end users primarily using mobile stations." 47 C.F.R. § 8.2(e). "Broadband Internet access service" is "[a] mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service." 47 C.F.R. § 8.2(a).

'real-time, two-way switched voice' service over its LTE network," it will have a duty to provide CMRS roaming under Rule 20.12(d). *Id.* ¶ 7 (JA___).

The Commission also upheld the Bureau's determination that Worldcall had failed to demonstrate that AT&T's proposed roaming rates were commercially unreasonable under Rule 20.12(e). *Id.* ¶¶ 8-9 (JA__-__). The Commission explained that, among other things, the evidence showed that [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] *Id*. ¶ 9 (JA __).

SUMMARY OF ARGUMENT

1. The Commission properly affirmed the Bureau's determination that Worldcall's roaming dispute with AT&T was subject to the data roaming rule in 47 C.F.R. § 20.12(e). The record showed that [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] and that Worldcall requested roaming using AT&T's mobile broadband

Internet access service – a non-interconnected commercial mobile data service.

a. Worldcall contends that its roaming dispute was subject to the CMRS roaming rule, 47 C.F.R. § 20.12(d). It interprets that rule to provide that when AT&T offers CMRS to *some* of its retail customers, *every* roaming service it offers requesting carriers is subject to the automatic roaming obligation in Rule 20.12(d). Because Worldcall did not first present that argument to the agency, it is barred by the exhaustion requirement in Section 405(a) of the Communications Act, 47 U.S.C. § 405(a).

Were the Court to reach it, that argument would fail. The CMRS roaming rule, by its terms, only applies to CMRS carriers, and by statute and by rule, a CMRS carrier must provide service that is interconnected with the public switched network. *See* 47 U.S.C. § 332(d)(1), (2); 47 C.F.R. § 20.12(a)(2). Because Worldcall concededly requested a non-interconnected roaming service, AT&T had no obligation to provide roaming in accordance with Rule 20.12(d). Instead, as the Commission correctly held, AT&T had a Rule 20.12(e) obligation to offer Worldcall a data roaming arrangement for a non-interconnected commercial mobile data service. *See* 47 C.F.R. § 20.12(e); *id.* § 20.3.

This interpretation is entirely consistent with the history of the two roaming rules. When the Commission promulgated the CMRS roaming rule in 2007, it determined that it would not cover non-CMRS services – specifically, non-interconnected data services – because that rule imposed a common carriage obligation on roaming providers. The Commission ultimately adopted the separate data roaming rule – which did not impose a common carriage duty – four years later. And in adopting the data roaming rule, the agency clarified that when a roaming provider offers commercial mobile data services, its roaming obligation is determined by Rule 20.12(e) – even if it also provides CMRS.

Worldcall's interpretation is not only inconsistent with that history, but it would render Rule 20.12(e) superfluous. If a provider of commercial mobile data service became subject to the CMRS roaming rule by providing CMRS service, as Worldcall contends, there would have been no reason for the Commission to have adopted a separate data roaming rule.

b. The Commission's interpretation of Rule 20.12 also would not allow carriers to avoid any obligation to provide roaming on their LTE networks. Whenever a host offers "real-time, two-way switched voice service," the Commission explained, its roaming obligation will be determined by Rule 20.12(d) – even if that service is provided over an LTE network.

Nor does the agency's interpretation exempt LTE networks from the data roaming obligation in Rule 20.12(e). Though Worldcall contends that obligation is limited to providers of retail mobile broadband Internet access service, that argument is waived, because it was not first presented to the Commission, *see* 47 U.S.C. § 405(a). It also fails on the merits, because Rule 20.12(e) applies to all facilities-based providers of "[a]ny mobile data service that is not interconnected with the public switched network," 47 C.F.R. §§ 20.3, 20.12(a) – a much larger category of services that includes, but is not limited to, mobile broadband Internet access service.

2. The Commission reasonably held that Worldcall failed to demonstrate that AT&T's proffered data roaming rate was commercially unreasonable. The record showed that rate was well within (or on the low end) of, comparable rates in AT&T's other roaming agreements.

a. Worldcall contends that the Commission should have considered its individual ability to compete in the market when analyzing the commercial reasonableness of the data roaming rate offered by AT&T. Though Worldcall presented that argument to the Bureau, it did not present it to the full Commission in its Application for Review, so it is not before this Court. *See* 47 U.S.C. § 405(a); *Environmentel, LLC v. FCC*, 661 F.3d 80, 84 (D.C. Cir. 2011). It also fails on the merits. The Commission has stated that when

determining whether a data roaming rate is commercially reasonable, it evaluates competition in the roaming market, not the impact of that rate on a competitor's ability to execute its business plan.

b. Worldcall also contends that the Commission should have considered [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]

c. Finally, the Commission did not err in comparing AT&T's roaming rates to those in its other data roaming agreements. Like many of Worldcall's other arguments, this one is not before the Court, because Worldcall did not first present it to the Commission. *See* 47 U.S.C. § 405(a). Regardless, it is unpersuasive. The only "evidence" Worldcall can muster are comments filed by other wireless providers in unrelated FCC rulemaking proceedings that do not even address the specific roaming terms and conditions offered by AT&T. Those comments do not rebut the Commission's determination that the data roaming rates AT&T charges other carriers are probative of the commercial reasonableness of the data roaming rate AT&T offered Worldcall.

STANDARD OF REVIEW

The Commission's disposition of Worldcall's Complaint against AT&T is subject to "arbitrary and capricious" review under 5 U.S.C. § 706(2)(A). "APA arbitrary and capricious review is narrow and deferential, requiring only that the agency articulate a rational relationship between the facts found and the choice made." *Texas Coalition of Cities for Utility Issues v. FCC*, 324 F.3d 802, 811 (5th Cir. 2003) (quoting *Alenco Commc'ns, Inc. v. FCC*, 201 F.3d 608, 619-20 (5th Cir. 2000)). "Under this highly deferential standard of review," the Court "has the least latitude in finding grounds for reversal"; it must uphold the Commission's order "if the agency's judgment conforms to minimum standards of rationality." *ConocoPhillips Co. v. EPA*, 612 F.3d 822, 831-32 (5th Cir. 2010) (internal quotation marks omitted).

The Commission's interpretation of its rules and orders is likewise subject to substantial deference. *S.W. Pharmacy Sols., Inc. v. Ctrs. for Medicare and Medicaid Servs.*, 718 F.3d 436, 442 (5th Cir. 2013); *see Auer v. Robbins*, 519 U.S. 452, 461 (1997). This Court generally accepts "an agency's interpretation of its own regulations absent plain error or inconsistency with those regulations." *Id.*; *Knapp v. U.S. Dept. of Agric.*, 796 F.3d 445, 454 (5th Cir. 2015).

The Commission's factual findings must be supported by "substantial evidence." 5 U.S.C. § 706(2)(E); *see* 47 U.S.C. § 402(g). Substantial evidence is that "which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion." *Memorial Hermann Hospital v. Sebelius*, 728 F.3d 400, 405 (5th Cir. 2013). It "requires 'something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" *Corrosion Proof Fittings v. EPA*, 957 F.2d 1201, 1213 (5th Cir. 1991) (quoting *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966)).

ARGUMENT

I. THE COMMISSION REASONABLY HELD THAT THE DATA ROAMING RULE APPLIED TO WORLDCALL'S ROAMING DISPUTE WITH AT&T

Worldcall contends that the Commission erred in finding that its roaming dispute with AT&T was subject to the data roaming rule, 47 C.F.R. § 20.12(e), alone. Pet. Br. 50-56. Worldcall is wrong.

Though Worldcall's Complaint alleged a violation of the CMRS roaming rule, 47 C.F.R. § 20.12(d), [BEGIN CONFIDENTIAL] [redacted] [END

CONFIDENTIAL] *Order* ¶ 3 (JA___); *see Interim Order* ¶ n.32 (JA___). The parties did not raise any dispute over voice roaming rates subject to Rule 20.12(d), which are based on minutes of use. *Id.*

The record before the Commission confirmed that the parties' dispute related only to data roaming under Rule 20.12(e). Worldcall "requested roaming using AT&T's mobile broadband Internet access service." *Order* ¶ 4 (JA___); *see Interim Order* n.32 (JA___). Worldcall conceded that Rule 20.12(e) applies to that service, Worldcall AFR at 10 (JA___), and further acknowledged that its Complaint alleged a violation of that rule. *Order* ¶ 4 (JA___) (quoting Worldcall AFR 8-9 (JA___)); *see also id.* (Worldcall argued that the *Division Order* "limit[ed] its ability to offer 'mobile broadband Internet access' to its customers").

Thus, on the record before it, the Commission reasonably determined that Worldcall sought a data roaming arrangement from AT&T.

A. The CMRS Roaming Rule Did Not Apply Because AT&T Would Not Be A CMRS Carrier Providing CMRS Service Under Worldcall's Proposed Roaming Arrangement

Worldcall contends that its roaming request was subject to the CMRS roaming rule, because AT&T is always subject to the CMRS roaming rule – even when it does not provide CMRS. *See, e.g.*, Pet. Br. 34, 42, 53.

Worldcall's argument is not properly before the Court because it was not raised before the Commission. It is meritless in any event.

1. Worldcall's Argument Was Never Presented To The Commission, And Is Therefore Barred By Statute

Worldcall asserts that because AT&T provides interconnected CMRS service to *some* of its retail customers, *every* service AT&T makes available for roaming – including the non-interconnected service Worldcall requested – is subject to Rule 20.12(d). *See, e.g.*, Pet. Br. 34, 42, 53. For that reason, Worldcall contends, the Commission erred in affirming the Bureau's determination that Rule 20.12(e) governed Worldcall's roaming request. This Court need not reach that issue, however, because it was not properly raised before the agency. Section 405 of the Communications Act expressly requires parties to file a petition for reconsideration with the Commission as a "condition precedent to judicial review" before they can raise any "question[] of fact or law upon which the Commission … has been afforded no opportunity to pass." 47 U.S.C. § 405(a). *See, e.g.*, *NTCH, Inc. v. FCC*, 841 F.3d 497, 508 (D.C. Cir. 2016); *In re FCC 11-161*, 753 F.3d 1015, 1063 (10th Cir. 2014).

Before the Commission, Worldcall made a different argument than the one it raises here. It asserted that because its customers would use AT&T's commercial mobile data service to make voice calls, its roaming dispute was

subject to Rule 20.12(d). In its Application for Review, for example, Worldcall stated that it was requesting "automatic [CMRS] roaming, not roaming for commercial mobile data service," because it "w[ould] provide" its customers, when they were roaming on AT&T's data network, "interconnected voice capability using its own LTE core facilities." Worldcall AFR Reply at 2 n.5 (JA___). It also more broadly argued that a roaming rate should be based on "the application the user runs on an LTE network." Worldcall AFR at 12 & n.48 (JA___). The Commission rejected that argument in the *Order*, explaining that "how [Worldcall] chooses to use the roaming services it has purchased" does not determine "the obligations imposed on AT&T based on the nature of [AT&T's] offerings." *Order* ¶ 6 (JA___).

To be sure, Worldcall in its Application for Review offhandedly remarked that "AT&T offers interconnected voice and data service to its own customers, so it is subject to Section 20.12(d)." Worldcall AFR at 7 (JA___). That broad statement does not make the argument now raised in Worldcall's brief that because AT&T provides interconnected voice and data services to its own customers, it *always* is subject to Rule 20.12(d). For that reason, the Commission reasonably read Worldcall's Application for Review to assert that AT&T is subject to Rule 20.12(d) only when it provides CMRS service,

consistent with the agency's own interpretation of that rule – not, as Worldcall now argues, that AT&T also is subject to Rule 20.12(d) when it provides non-interconnected services.

To "satisfy the requirements of section 405(a)," Worldcall must demonstrate that "a reasonable Commission *necessarily* would have seen the question raised before the [the Court] as part of the case presented to it." *NTCH*, 841 F.3d at 508 (internal quotation marks and citation omitted); *see Nueva Esperanza, Inc. v. FCC*, 863 F.3d 854, 860-61 (D.C. Cir. 2017); 47 C.F.R. § 1.115(b)(1) ("[t]he application for review shall concisely and plainly state the questions presented for review"). Worldcall's "vague allusion[] to [its] current argument" that AT&T is always subject to Rule 20.12(d) does not satisfy that standard. *NTCH*, 841 F.3d at 508; *Environmentel*, 661 F.3d at 84; *Qwest Corp. v. FCC*, 482 F.3d 471, 478 (D.C. Cir. 2007). The Commission therefore had no opportunity to pass on Worldcall's argument, and it is not properly before this Court.

2. A CMRS Carrier Only Has An Obligation To Provide CMRS Roaming When It Is Offering CMRS

a. Worldcall's argument is in any event meritless. Worldcall contends that because AT&T offered CMRS to its own customers, Worldcall's roaming request was governed by the CMRS roaming rule, Pet. Br. 53 – even

though Worldcall did not request a CMRS roaming service. That argument is contrary to the text, structure, and history of Rule 20.12.

The CMRS roaming rule applies to CMRS carriers, and by statute and by rule a carrier is treated as a CMRS carrier only to the extent it is providing service that is interconnected with the public switched network. *See* 47 U.S.C. § 332(d)(1), (2); 47 C.F.R. § 20.12(a)(2). As we have explained, *see* pp. 6-7, subsection (d) of Rule 20.12 states that only a "host carrier subject to [subsection] (a)(2)" has a duty to "provide" automatic roaming to "any technologically compatible, facilities-based CMRS carrier." 47 C.F.R. § 20.12(d). To fall within the scope of subsection (a)(2), the host must be a "CMRS carrier[]" that "offer[s] real-time, two-way switched voice or data service that is interconnected with the public switched network." 47 C.F.R. § 20.12(a)(2). *See Order* ¶ 6 (JA___). To be classified as a CMRS carrier under the Communications Act, an entity must offer interconnected service. 47 U.S.C. § 332(d)(1). *See Order* ¶ 6 (JA___).

When that entity is not providing interconnected service, it is not treated as a CMRS carrier. In that case, Rule 20.12(e) requires "[a] facilities-based provider of commercial mobile data services" to "offer roaming arrangements to other such providers." 47 C.F.R. § 20.12(e). By definition,

"commercial mobile data service" is "not interconnected with the public switched network." *See* 47 C.F.R. § 20.3.

It is the service that the host is offering, as set forth in subsections (a)(2) and (a)(3) of Rule 20.12, that determines whether the host, upon request, must provide CMRS roaming pursuant to subsection (d) or data roaming pursuant to subsection (e). As the Commission explained, "the obligations imposed under the CMRS roaming rule were … intended to apply to a host carrier only 'insofar as such person is engaged' in the provision of CMRS, text messaging, and push-to talk." *Order* ¶ 6 (JA __).[7] *See* 47 U.S.C. § 332(c)(1) (a CMRS provider shall be treated as a common carrier "insofar as such person is so engaged"); *2007 Order* ¶ 26 (CMRS roaming obligations apply "with respect to the provisioning of that service").

Thus, only when the host is offering "real-time, two-way switched voice or data service that is *interconnected* with the public switched network," 47 C.F.R. § 20.12(a)(2) (emphasis added), must it provide CMRS

[7] The Commission determined that text messaging and push-to-talk should be covered by the automatic roaming rule because "consumers consider push-to-talk and SMS [Short Message Service, another name for text messaging] as features that are typically offered as adjuncts to basic voice services, and expect the same seamless connectivity with respect to these features and capabilities as they travel outside their home network service areas." *2007 Order* ¶ 55.

roaming, 47 C.F.R. § 20.12(d). In contrast, when the host is providing a "mobile data service that is *not interconnected* with the public switched network," 47 C.F.R. §§ 20.3 (emphasis added), 20.12(a)(3), it must offer a data roaming arrangement, 47 C.F.R. § 20.12(e).

In other words, when a carrier that *also* provides CMRS voice service to customers provides commercial mobile data service to a customer, it has no obligation to provide CMRS roaming pursuant to 47 C.F.R. § 20.12(d). *Order* ¶ 6 (JA___). Instead, the entity is for those purposes considered to be a provider of commercial mobile data service, *see* 47 C.F.R. § 20.12(a)(3), with an obligation to offer a data roaming arrangement pursuant to 47 C.F.R. § 20.12(e). By way of analogy, just because the owner of a fruit stand (AT&T) sells both apples (CMRS) and oranges (commercial mobile data service), her customer (Worldcall) cannot demand an orange at the price of an apple.

b. Worldcall's interpretation of the roaming rules is inconsistent not only with the text but also with the history of the Commission's roaming rules. The data roaming rule grew out of the Commission's examination of whether to "extend" the automatic roaming rule "to non-interconnected data services or features, including information services or other non-CMRS services offered by CMRS carriers." *Data Roaming Order* ¶ 6. Finding that it

should not, the Commission adopted the separate, non-common carriage obligation to offer data roaming codified in Rule 20.12(e). *Id.* ¶ 68. As it explained, the data roaming rule "complement[s]" the CMRS roaming rule by "cover[ing] mobile services that fall outside the scope of that obligation." *Id.* ¶ 41. Thus, the Commission held, "[s]o long as" a roaming provider offers "mobile data services that are for profit and available to the public," it will be "covered" by Rule 20.12(e), "regardless of whether [it] also provides any CMRS." *Id.* ¶ 41.

c. Moreover, Worldcall's interpretation would render the data roaming rule superfluous. If a provider of commercial mobile data service became subject to the CMRS roaming rule simply by providing CMRS service to the public, as Worldcall contends, Pet. Br. 53, there would have been no reason for the Commission to adopt a separate data roaming rule for such carriers. Indeed, in its brief, Worldcall does not identify any data roaming request it or another wireless provider could make to AT&T or another host that would be subject to the data roaming rule. As this Court has stated, "[w]hen presented with two plausible readings of a regulatory text," the Court "prefers the reading that does not render portions of that text superfluous." *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 399 (5th Cir. 2014) (finding it "hard to understand" why an agency would provide two pricing options in a regulation

if every entity covered by the regulation was eligible for one of those options).

d. Before the agency, Worldcall "concede[d] that, when its customers use [its] voice or other services while roaming on AT&T's network, '[t]o AT&T it will be no different than when [Worldcall's] customer is surfing the web or receiving an email.'" *Order* ¶ 5 (quoting Complaint at ¶¶ 271-72) (JA__)). *See* Pet. Br. 34-35 (explaining that the roaming service Worldcall requested "does not include host 'awareness' of whether the roamer is talking on the phone (automatic roaming) or on the Internet (data roaming)"). The roaming service Worldcall describes is thus paradigmatic non-interconnected commercial mobile data service. The Commission therefore appropriately found that Worldcall's roaming request was subject to the data roaming rule, 47 C.F.R. § 20.12(e), and not the CMRS roaming rule, 47 C.F.R. § 20.12(d).

B. The Commission's Interpretation Of Its Roaming Rules Does Not Foreclose Roaming For LTE Services

Worldcall contends that the Commission's reading of its roaming rules would allow carriers to avoid any obligation to provide roaming on its LTE network. Pet. Br. 53-54. That argument is meritless.

The crux of Worldcall's argument is that it does not want or need AT&T to provide roaming with interconnection or Internet access – it can provide those functionalities on its own. *See* Pet. Br. 26, 53-54. That just

means, as the facts of this case show, that Worldcall is asking for a data roaming arrangement, because it is the data roaming rule that applies to non-interconnected roaming services. 47 C.F.R. § 20.12(e); *see id.* § 20.3.[8]

Moreover, as the Commission explained, its interpretation of Rule 20.12 "does not exempt LTE networks from the CMRS [roaming] rule." *Order* ¶ 7 (JA___). "[I]f a host provider 'offers real-time, two-way switched voice' service over its LTE network," then "such roaming service" will be "subject to the CMRS roaming rules," and nothing in the *Order* "implies" or "requires" otherwise. *Id.*

Nor does the Commission's interpretation exempt LTE networks from the data roaming rule. Worldcall contends that Rule 20.12(a)(3) is limited to providers of "retail" "mobile broadband Internet access service," Pet. Br. 25-27, 51, and wireless carriers roaming on LTE networks do not need host-supplied Internet access, because they can supply their own. Pet. 53-54. This argument was never presented to the Commission, and is therefore barred by the Communications Act's exhaustion requirement. 47 U.S.C. § 405(a). It

[8] In the *Data Roaming Order*, the Commission declined to designate data roaming service that "provid[es] pure data transmission to another carrier" as a "telecommunications service," which would have subjected it to Rule 20.12(d). *Data Roaming Order* ¶ 70. Worldcall concedes that it wants AT&T to provision roaming in this manner. *See* Pet. Br. 53 ("host provided interconnection or Internet access was not necessary").

also lacks merit. The data roaming rule applies to all facilities-based providers of "[a]ny mobile data service that is not interconnected with the public switched network." 47 C.F.R. §§ 20.3, 20.12(a)(3). This is a broad category of non-interconnected services that can (but need not) include Internet access. *See Data Roaming Order* ¶ 7 (noting that "mobile data service[] include[s] mobile broadband Internet access").

Further, roaming without interconnection or Internet access is not a new type of roaming, as Worldcall seems to contend, *see* Pet. Br. 53-56; rather, it was Worldcall's preferred method of implementing a roaming arrangement. And in fact, AT&T offered Worldcall roaming on its LTE network using that technical configuration. *Order* ¶¶ 4-5 (JA___).[9]

When it adopted the data roaming rule, the Commission stated that the "actual provisioning of data roaming," and "any practices in connection with" data roaming, "will be subject to individually negotiated contractual provisions." *Data Roaming Order* ¶ 68. Thus, AT&T must offer Worldcall a roaming arrangement for non-interconnected commercial mobile data service if it provides a commercial mobile data service to its own retail customers,

[9] The dispute before the agency was merely whether the CMRS roaming rule (Rule 20.12(d)) or the data roaming rule (Rule 20.12(e)) governed the Commission's review of that roaming arrangement. *Order* ¶¶ 4-7 (JA___).

see 47 C.F.R. §§ 20.12(a)(3), (e). But how that arrangement is implemented (*e.g.*, with or without Internet access) is a matter negotiated between the parties, and it does not change the fact that it is a data roaming arrangement. *Data Roaming Order* ¶¶ 52-53.

Worldcall's real grievance is not that the FCC's interpretation of Rule 20.12 forecloses roaming on LTE networks. Rather, it is the Commission's determination that the rate for Worldcall's preferred method of purchasing roaming is subject to Rule 20.12(e)'s "commercially reasonable" benchmark and not Rule 20.12(d)'s just, reasonable, and nondiscriminatory standard. But the Commission correctly found that the roaming arrangement Worldcall sought was subject to the former, because it used a non-interconnected data service (AT&T's mobile broadband Internet access service), *Order* ¶¶ 4-5 (JA___), and [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] *id.* ¶ 3 (JA___).

Nonetheless, Worldcall seems to argue that Rule 20.12(d) is a dead letter, at least insofar as carriers like Worldcall only want to roam on LTE networks using arrangements that are subject to Rule 20.12(e). Pet. Br. 55. Worldcall is free to file a petition for rulemaking that asks the Commission to reconsider its data roaming rules given advances in technology and industry preferences. *See* 47 C.F.R. § 1.401. In the meantime, Worldcall cannot fault

the agency for failing to apply its common-carriage CMRS roaming obligation (Rule 20.12(d)) to non-interconnected data roaming services that are instead subject to Rule 20.12(e).

II. THE COMMISSION REASONABLY FOUND THAT WORLDCALL DID NOT DEMONSTRATE THAT AT&T'S PROFFERED DATA ROAMING RATES WERE COMMERCIALLY UNREASONABLE

In addition to challenging the Commission's determination that Rule 20.12(e) instead of Rule 20.12(d) applies to this case, Worldcall also challenges the agency's application of Rule 20.12(e). This argument, too, lacks merit.

A. The FCC Properly Applied Its Roaming Rules And Policies

The Commission reasonably affirmed the Bureau's holding that "[Worldcall] failed to demonstrate that AT&T's proposed data roaming rates are commercially unreasonable under [Rule] 20.12(e)." *Order* ¶ 2 (JA___); *id.* ¶ 8 (JA___).

The agency has repeatedly explained that one of the factors for assessing commercial reasonableness – "'whether the providers involved have had previous data roaming arrangements with similar terms'" – "expressly contemplate[s] that the terms of other data roaming arrangements … could be relevant in th[at] analysis." *2014 Declaratory Ruling* ¶ 16

(quoting *Data Roaming Order* ¶ 86). Here, the Bureau looked at precisely such data. The record showed that [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] *Interim Order* ¶ 22 (JA___). Based on that evidence, the Bureau determined that [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] *Interim Order* ¶ 23 (JA___). The Commission agreed, concluding that the Bureau "properly analyzed the roaming rate evidence presented," *Order* ¶ 9 (JA __), and affirming the Bureau's determination that Worldcall had failed to carry its burden of showing that AT&T's rates were commercially unreasonable, *id*. ¶ 2 (JA___).

B. Worldcall Is Barred From Arguing That The "Commercial Reasonableness" Analysis Must Consider The Roaming Purchaser's Ability To Compete, And That Argument Also Lacks Merit

Worldcall complains that the Commission "expressly refused to consider 'commercial reasonableness' from the 'buy' side." Pet. Br. 58; *id*. 57-59, 68. The reason the Commission did not address this issue is straightforward: Worldcall did not raise it before the Commission. Hence, Worldcall's argument is not before the Court, because it was not raised before the agency.

As we have explained, Section 405(a) of the Communications Act provides that the filing of a petition for reconsideration with the Commission is a "condition precedent to judicial review" of any "questions of fact or law upon which the Commission … has been afforded no opportunity to pass." 47 U.S.C. § 405(a). And Section 5(c)(7) of the Communications Act provides that "an application for review" to the Commission is a "condition precedent" to judicial review of any action taken by Commission staff on delegated authority. 47 U.S.C. § 155(c)(7). *Accord* 47 C.F.R. § 1.115(k). "Under these two provisions, the full FCC must have the opportunity to review all cases and all aspects of those cases before parties may exercise their statutory right to appeal." *Environmentel*, 661 F.3d at 84.

Before the Commission, Worldcall never argued that the agency's "commercial reasonableness" analysis requires it to consider Worldcall's individual ability to compete under the proposed price" for roaming. Pet. Br. 60. Though a variation of that argument appeared in Worldcall's Complaint, Pet. Br. 56, and the Bureau responded to it in footnote 78 of the *Interim Order* (JA___), Worldcall did not renew the contention in its Application for

Review of the *Division Order*.[10] Because "raising an issue before" the Commission's staff "is not enough to preserve it for review before this Court," Worldcall is precluded from raising the argument now. *Environmentel*, 661 F.3d at 84; *see Bartholdi Cable Co. Inc. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997).

Regardless, the argument lacks merit. To be sure, the Commission in the *Data Roaming Order* required facilities-based providers of commercial mobile data services "to offer data roaming" to other such providers "on an individualized case-by case basis." *Data Roaming Order* ¶ 67; *id.* ¶ 68. But while data roaming arrangements are to be individually negotiated, an individual carrier's "ability to compete" in the retail market does not determine whether that arrangement is commercially reasonable. *Interim Order* n.78 (JA___). Rather, it is "the level of competitive harm in a given *market* and the benefits to *consumers*" that matter. *Data Roaming Order* ¶ 86 (emphasis added). In the proceeding below, the Bureau determined that "[Worldcall's] claimed individual inability to compete demonstrates neither."

[10] Worldcall's Application for Review made a different argument – that AT&T's roaming rates effect a restraint on trade because they vastly exceed its retail rates. *See* Pet. Br. 60 (citing Worldcall AFR, pp. iv, 5, 22-23, 24 (JA___)). The Commission addressed and rejected that argument in the *Order*. *Order* n.25 (JA __).

It went on to suggest that the rate was sufficiently low for efficient providers to compete – observing that AT&T had made an unrebutted contention that "dozens" of "rural and small providers" were paying data roaming rates "comparable" to those AT&T offered Worldcall. *Interim Order* n.78 (JA___). The Commission adopted the data roaming rule to "promote consumer access to nationwide mobile broadband service," *Data Roaming Order* ¶ 1 – not to support a particular roaming purchaser's business plan, *Interim Order* n.78 (JA___).

Worldcall seeks to have the Commission adopt a new legal framework for evaluating whether a data roaming rate is commercially reasonable. It is free to present its arguments to the Commission in a petition for rulemaking. *See* 47 C.F.R. § 1.401. Until then, the agency reasonably applied the rule in effect – which does not consider the impact of a roaming rate "on the specific requesting carrier," Pet. Br. 60 – to Worldcall's roaming dispute with AT&T.[11]

[11] Worldcall also attempts to show that the amount it would pay AT&T for roaming sometimes would exceed a cap on retail rates imposed by the Texas Universal Service Program. Pet. Br. 61-62. The Commission, however, need not account for a roaming purchaser's other regulatory obligations when determining whether a data roaming provider's proposed rate is commercially reasonable. Worldcall does, though, remain free to ask Texas to raise its retail rate cap.

C. The Commission Did Not Act Arbitrarily Or Capriciously When It Affirmed The Bureau's Analysis of AT&T's Roaming Rates

Worldcall contends that, in affirming the Bureau's determination of commercial reasonableness, the Commission wrongly refused to consider [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] and the impact of AT&T's rates on other roaming purchasers. Pet. Br. 63-70. The Commission was justified in both respects.

1. Worldcall contends that the Commission should have concluded [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] Pet. Br. 64.

The Bureau explained why this was not true. Given [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] *Interim Order* ¶ 25 (JA___). Worldcall complains that "[t]he superiority finding" is "a justification for higher prices." Pet. Br. 65. But there is nothing commercially unreasonable about a company charging more for a superior product. The Commission intended the data

roaming rule to "accommodate a variety of terms and conditions in data roaming" and "allow[] host providers to control the terms and conditions of proffered data roaming agreements, within a general requirement of commercial reasonableness." *Data Roaming Order* ¶¶ 33, 81. It is not commercially unreasonable for AT&T to charge more given, as Worldcall concedes, that it has the more "expansive network." Pet. Br. 65.

Worldcall's assertion that the Commission "effectively defined the relevant 'market'" to only include AT&T is similarly baseless. *Id*. The Commission did compare [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] *Initial Order* ¶ 25 (JA___). The Commission just disagreed with Worldcall that AT&T should be mandated to match those rates. Likewise, Worldcall's contention that the Commission forced Worldcall to "accept AT&T's adhesion offer," Pet. Br. 66, is belied by the fact that AT&T was not Worldcall's only alternative; prior to filing its Complaint, [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] *Interim Order* ¶ 25 (JA___).

2. Worldcall also argues that the Commission should not have compared AT&T's proffered data roaming rate to those AT&T offered other

carriers, because those rates also are commercially unreasonable. Pet. Br. 67-69. That argument is not before the court, because Worldcall presented it to the Bureau but not to the full Commission.[12] *See* 47 U.S.C. §§ 155(c)(7), 405(a); 47 C.F.R. § 1.115(k). Regardless, it lacks merit.

According to Worldcall, "[m]any carriers that accepted 'comparable' prices were loudly advising" the Commission that those rates were unreasonable. Pet. Br. 68. It points to comments filed by small wireless carriers in unrelated Commission rulemaking proceedings. But those comments, which were filed between 2011 and 2015, only express general dissatisfaction with data roaming rates offered by AT&T and Verizon, the nation's two largest providers of wireless services. *Id*. 68-69; *see* JA____. In addition, some were filed by Code Division Multiple Access (CDMA) carriers that do not have the capability to roam on AT&T's Global System for Mobiles (GSM) network (*e.g.*, C-spire and NTELOS).[13] None of them

[12] The "evidence" Worldcall cites on pages 68-69 of its brief was presented in the Reply Declaration of Martyn Roetter, which was attached to Worldcall's Reply to AT&T's Response to Worldcall's Complaint. Worldcall did not re-submit that declaration with its Application for Review of the *Division Order*.

[13] CDMA and GSM are the two major digital radio systems that traditionally have been used in mobile phones. AT&T uses GSM; Verizon uses CDMA.

address the specific data roaming terms and conditions offered by AT&T to Worldcall and others, which was the basis of the determination here.

Further, as set forth above, *see* pp. 41-42, the data roaming rule was designed to protect competition, not competitors. The record showed that, even if they were complaining, many other carriers were in fact roaming on AT&T's network. *Interim Order* ¶ 23 (JA __); *Order* ¶ 9 (JA __). That some of them viewed those rates as high is beside the point.

Accordingly, even if Worldcall had presented this "evidence" to the Commission, it would not "rebut" the agency's determination that the rates in AT&T's other data roaming agreements were "highly probative of the commercial reasonableness" of the rates AT&T offered Worldcall. *Interim Order* ¶ 23 (JA___).

In the end, the issue is not whether Worldcall can present some "evidence" that AT&T's rates were commercially unreasonable. It is whether there was substantial evidence before the Commission of the reasonableness of those rates: that is, evidence that "a reasonable mind could accept as adequate to support" the Commission's determination. *Memorial Hermann Hosp.*, 728 F.3d at 405. That is the case here.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, Maureen K. Flood, hereby certify that on March 8, 2018, I filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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Statutory Addendum

47 U.S.C. § 155

§ 155. Commission

* * *

(c) Delegation of functions; exceptions to initial orders; force, effect and enforcement of orders; administrative and judicial review; qualifications and compensation of delegates; assignment of cases; separation of review and investigative or prosecuting functions; secretary; seal

(1) When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions (except functions granted to the Commission by this paragraph and by paragraphs (4), (5), and (6) of this subsection and except any action referred to in sections 204(a)(2), 208(b), and 405(b) of this title) to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter; except that in delegating review functions to employees in cases of adjudication (as defined in section 551 of Title 5), the delegation in any such case may be made only to an employee board consisting of two or more employees referred to in paragraph (8) of this subsection. Any such rule or order may be adopted, amended, or rescinded only by a vote of a majority of the members of the Commission then holding office. Except for cases involving the authorization of service in the instructional television fixed service, or as otherwise provided in this chapter, nothing in this paragraph shall authorize the Commission to provide for the conduct, by any person or persons other than persons referred to in paragraph (2) or (3) of section 556(b) of Title 5, of any hearing to which such section applies.

* * *

(7) The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1) of this subsection. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under

section 402(b) of this title, shall be computed from the date upon which public notice is given of orders disposing of all applications for review filed in any case.

* * *

47 U.S.C. § 160

§ 160. Competition in provision of telecommunications service

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that--

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed

In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for forbearance

Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or

any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a) of this section. The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) Limitation

Except as provided in section 251(f) of this title, the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State enforcement after commission forbearance

A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a) of this section.

47 U.S.C. § 201

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: Provided, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: Provided further, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: Provided further, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. § 202

§ 202. Discriminations and preferences

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included

Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty

Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

47 U.S.C. § 208

§ 208. Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation

(a) Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(b)(1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

(2) The Commission shall, with respect to any such investigation initiated prior to November 3, 1988, issue an order concluding the investigation not later than 12 months after November 3, 1988.

(3) Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C. § 301

§ 301. License for radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

47 U.S.C. § 303

§ 303. Powers and duties of Commission

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

* * *

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

* * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

* * *

47 U.S.C. § 332

§ 332. Mobile services

* * *

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) 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 chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that--

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

* * *

(d) Definitions

For purposes of this section--

(1) the term “commercial mobile service” means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term “interconnected service” means service that is interconnected with the public switched network (as such terms are defined by regulation by the

Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

(3) the term “private mobile service” means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

47 U.S.C. § 405

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have

been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 C.F.R. § 0.111

§ 0.111 Functions of the Bureau.

(a) Serve as the primary Commission entity responsible for enforcement of the Communications Act and other communications statutes, the Commission's rules, Commission orders and Commission authorizations, other than matters that are addressed in the context of a pending application for a license or other authorization or in the context of administration, including post-grant administration, of a licensing or other authorization or registration program.

(1) Resolve complaints, including complaints filed under section 208 of the Communications Act, regarding acts or omissions of common carriers (wireline, wireless and international).

* * *

47 C.F.R. § 1.115

§ 1.115 Application for review of action taken pursuant to delegated authority.

(a) Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission. Any person filing an application for review who has not previously participated in the proceeding shall include with his application a statement describing with particularity the manner in which he is aggrieved by the action taken and showing good reason why it was not possible for him to participate in the earlier stages of the proceeding. Any application for review which fails to make an adequate showing in this respect will be dismissed.

(b)(1) The application for review shall concisely and plainly state the questions presented for review with reference, where appropriate, to the findings of fact or conclusions of law.

* * *

(k) The filing of an application for review shall be a condition precedent to judicial review of any action taken pursuant to delegated authority.

47 C.F.R. § 1.401

§ 1.401 Petitions for rulemaking.

(a) Any interested person may petition for the issuance, amendment or repeal of a rule or regulation.

(b) The petition for rule making shall conform to the requirements of §§ 1.49, 1.52, and 1.419(b) (or § 1.420(e), if applicable), and shall be submitted or addressed to the Secretary, Federal Communications Commission, Washington, DC 20554, or may be submitted electronically.

(c) The petition shall set forth the text or substance of the proposed rule, amendment, or rule to be repealed, together with all facts, views, arguments and data deemed to support the action requested, and shall indicate how the interests of petitioner will be affected.

(d) Petitions for amendment of the FM Table of Assignments (§ 73.202 of this chapter) or the Television Table of Assignments (§ 73.606) shall be served by petitioner on any Commission licensee or permittee whose channel assignment would be changed by grant of the petition. The petition shall be accompanied by a certificate of service on such licensees or permittees. Petitions to amend the FM Table of Allotments must be accompanied by the appropriate construction permit application and payment of the appropriate application filing fee.

(e) Petitions which are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission may be denied or dismissed without prejudice to the petitioner.

47 C.F.R. § 8.2

§ 8.2 Definitions.

(a) Broadband Internet access service. A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this part.

* * *

(e) Mobile broadband Internet access service. A broadband Internet access service that serves end users primarily using mobile stations.

47 C.F.R § 20.3

§ 20.3 Definitions.

* * *

Commercial mobile data service. (1) Any mobile data service that is not interconnected with the public switched network and is:

(i) Provided for profit; and

(ii) Available to the public or to such classes of eligible users as to be effectively available to the public.

(2) Commercial mobile data service includes services provided by Mobile Satellite Services and Ancillary Terrestrial Component providers to the extent the services provided meet this definition.

* * *

47 C.F.R § 20.12

§ 20.12 Resale and roaming.

* * *

(a)(2) Scope of automatic roaming. Paragraph (d) of this section is applicable to CMRS carriers if such carriers offer real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the carrier to re-use frequencies and accomplish seamless hand-offs of subscriber calls. Paragraph (d) of this section is also applicable to the provision of push-to-talk and text-messaging service by CMRS carriers.

(3) Scope of offering roaming arrangements for commercial mobile data services. Paragraph (e) of this section is applicable to all facilities-based providers of commercial mobile data services.

* * *

(d) Automatic roaming. Upon a reasonable request, it shall be the duty of each host carrier subject to paragraph (a)(2) of this section to provide automatic roaming to any technologically compatible, facilities-based CMRS carrier on reasonable and not unreasonably discriminatory terms and conditions, pursuant to Sections 201 and 202 of the Communications Act, 47 U.S.C. 201 and 202. The Commission shall presume that a request by a technologically compatible CMRS carrier for automatic roaming is reasonable pursuant to Sections 201 and 202 of the Communications Act, 47 U.S.C. 201 and 202. This presumption may be rebutted on a case by case basis. The Commission will resolve automatic roaming disputes on a case-by-case basis, taking into consideration the totality of the circumstances presented in each case.

(e) Offering roaming arrangements for commercial mobile data services.

(1) A facilities-based provider of commercial mobile data services is required to offer roaming arrangements to other such providers on commercially reasonable terms and conditions, subject to the following limitations:

(i) Providers may negotiate the terms of their roaming arrangements on an individualized basis;

(ii) It is reasonable for a provider not to offer a data roaming arrangement to a requesting provider that is not technologically compatible;

(iii) It is reasonable for a provider not to offer a data roaming arrangement where it is not technically feasible to provide roaming for the particular data service for which roaming is requested and any changes to the host provider's network necessary to accommodate roaming for such data service are not economically reasonable;

(iv) It is reasonable for a provider to condition the effectiveness of a roaming arrangement on the requesting provider’s provision of mobile data service to its own subscribers using a generation of wireless technology comparable to the technology on which the requesting provider seeks to roam.

(2) A party alleging a violation of this section may file a formal or informal complaint pursuant to the procedures in §§ 1.716 through 1.718, 1.720, 1.721, and 1.723 through 1.735 of this chapter, which sections are incorporated herein. For purposes of § 20.12(e), references to a “carrier” or “common carrier” in the formal and informal complaint procedures incorporated herein will mean a provider of commercial mobile data services. The Commission will resolve such disputes on a case-by-case basis, taking into consideration the totality of the circumstances presented in each case. The remedy of damages shall not be available in connection with any complaint alleging a violation of this section. Whether the appropriate procedural vehicle for a dispute is a complaint under this paragraph or a petition for declaratory ruling under § 1.2 of this chapter may vary depending on the circumstances of each case.