

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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In the Matter of	)	
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Reexamination of Roaming Obligations of	)	WT Docket No. 05-265
Commercial Mobile Radio Service Providers	)	
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**REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING**

**Adopted: August 7, 2007**

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**Comment Date: (60 days after publication in the Federal Register)**

**Reply Comment Date: (90 days after publication in the Federal Register)**

By the Commission: Chairman Martin and Commissioners Tate and McDowell issuing separate statements; Commissioners Copps and Adelstein approving in part, concurring in part, and issuing separate statements.

**TABLE OF CONTENTS**

Heading	Paragraph #
I. INTRODUCTION.....	1
II. BACKGROUND.....	5
III. REPORT AND ORDER.....	18
A. AUTOMATIC ROAMING OBLIGATIONS.....	19
1. Automatic Roaming.....	19
a. Background.....	19
b. Discussion.....	23
2. Determination Not to Impose Rate Regulation on Roaming Agreements.....	36
a. Background.....	36
b. Discussion.....	37
B. OTHER ISSUES.....	41
1. “Most Favored” Roaming Partner Rates for Tier IV CMRS Providers.....	42
2. In-Market or Home Roaming.....	46
3. Access to Certain Data Features and Enhanced Digital Networks.....	52
a. Access to push-to-talk, text messaging (SMS) and non-interconnected data features.....	52
b. Access to Enhanced Digital Networks.....	57
4. Public Filing of Roaming Rates.....	61
C. CODIFICATION OF AUTOMATIC ROAMING OBLIGATIONS.....	63
D. PETITION FOR INVESTIGATION PURSUANT TO SECTION 403 OF THE ACT.....	68
E. MANUAL ROAMING.....	72
IV. FURTHER NOTICE OF PROPOSED RULEMAKING.....	77

V. PROCEDURAL MATTERS.....	82
A. Final Regulatory Flexibility Analysis.....	82
B. Initial Regulatory Flexibility Analysis.....	83
C. Ex Parte Presentations.....	84
D. Comment Filing Procedures.....	85
E. Paperwork Reduction Act.....	89
F. Congressional Review Act.....	90
G. Contact Persons.....	91
VI. ORDERING CLAUSES.....	92
APPENDIX A- Final Rules	
APPENDIX B- List of Commenters	
APPENDIX C- Final Regulatory Flexibility Analysis	
APPENDIX D- Initial Regulatory Flexibility Analysis	

## I. INTRODUCTION

1. In this Report and Order, we clarify that automatic roaming is a common carrier obligation for commercial mobile radio service (CMRS) carriers,<sup>1</sup> requiring them to provide roaming services to other carriers upon reasonable request and on a just, reasonable, and non-discriminatory basis pursuant to Sections 201 and 202 of the Communications Act. We reiterate the Commission’s earlier determination that roaming is a common carrier service because roaming capability gives end users access to a foreign network in order to communicate messages of their own choosing.<sup>2</sup> Thus, the provision of roaming is subject to the requirements of Section 201, 202, and 208 of the Communications Act.<sup>3</sup>

2. We determine that when a reasonable request is made by a technologically compatible CMRS carrier, a host CMRS carrier must provide automatic roaming to the requesting carrier outside of the requesting carrier’s home market, consistent with the protections of Sections 201 and 202 of the Communications Act. We also find that the common carrier obligation to provide roaming extends to services that are real-time, two-way switched voice or data service that are interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls. Additionally, we decline to sunset the

<sup>1</sup>“Commercial mobile service” is defined to mean “any mobile service . . . 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.” 47 U.S.C. § 332(d)(1). *See also* 47 C.F.R. § 20.3 defining “Commercial mobile radio service” as “[a] mobile service that is: (a)(1) provided for profit, *i.e.*, with the intent of receiving compensation or monetary gain; (2) An interconnected service; and (3) Available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (b) The functional equivalent of such a mobile service described in paragraph (a) of this section.”

<sup>2</sup> *See* Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, *Second Report and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 9462, 9468-69 ¶ 10 (1996) (“*Interconnection and Resale Obligations Second Report and Order*” and “*Interconnection and Resale Obligations Third NPRM*,” respectively).

<sup>3</sup> *See* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services, WT Docket No. 05-265, *Memorandum Opinion & Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 15047, 15048 ¶ 2 (2005) (“*Reexamination NPRM*”); *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd 9463-71 ¶¶ 1-14. *See also* 47 C.F.R. § 20.15. Section 332(c)(1) of the Act provides that a person engaged in the provision of a service that is a commercial mobile service shall be treated as a common carrier for purposes of the Act. *See* 47 U.S.C. § 332(c)(1).

existing manual roaming requirement at this time to provide additional flexibility for consumers. We note that roaming, as a common carrier obligation, does not extend to services that are classified as information services or to services that are not CMRS.<sup>4</sup>

3. We recognize that today CMRS consumers increasingly rely on mobile telephony services and they reasonably expect to continue their wireless communications even when they are out of their home network area. We believe our findings and clarifications in this Report and Order with respect to CMRS providers' obligations regarding roaming services serve the public interest and safeguard wireless consumers' reasonable expectations of receiving seamless nationwide commercial mobile telephony services through roaming.

4. Finally, in the Further Notice of Proposed Rulemaking, we seek comment on whether the roaming obligation should be extended to non-interconnected services or features, including services that are classified as information services, or to services that are not CMRS.

## II. BACKGROUND

5. "Roaming" occurs when the subscriber of one CMRS provider utilizes the facilities of another CMRS provider with which the subscriber has no direct pre-existing service or financial relationship to place an outgoing call, to receive an incoming call, or to continue an in-progress call.<sup>5</sup> Typically, although not always, roaming occurs when a subscriber places or receives a call while physically located outside of the service area of its "home" CMRS provider. The basic technical requirement for roaming, whether done manually or automatically, is that the subscriber has a handset that is capable of accessing the roamed-on (host) system.<sup>6</sup>

6. There are two forms of roaming -- manual and automatic. With manual roaming, the subscriber must establish a relationship with the host carrier on whose system he or she wants to roam in order to make a call.<sup>7</sup> Typically, the roaming subscriber accomplishes this in the course of attempting to originate a call by giving a valid credit card number to the carrier providing the roaming service. By contrast, with automatic roaming, the roaming subscriber is able to originate or terminate a call without taking any special actions.<sup>8</sup> Automatic roaming requires a pre-existing contractual agreement between the

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<sup>4</sup> Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, *Declaratory Ruling*, 22 FCC Rcd. 5901, ¶¶ 11-12 (2007) ("*Wireless Broadband Internet Access Declaratory Ruling*"); 47 C.F.R. § 20.9.

<sup>5</sup> See *Reexamination NPRM*, 20 FCC Rcd at 15048 ¶ 2. Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services, WT Docket No. 00-193, *Notice of Proposed Rulemaking*, 15 FCC Rcd 21628 ¶ 2 (2000) ("*2000 CMRS Roaming NPRM*"); *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9464 ¶ 3. Section 22.99 of the Commission's rules describes a "roamer" as "[a] mobile station receiving service from a station or system in the Public Mobile Services other than one to which it is a subscriber." 47 C.F.R. § 22.99.

<sup>6</sup> See *2000 CMRS Roaming NPRM*, 15 FCC Rcd at 21629 ¶ 2; *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9466 ¶ 7.

<sup>7</sup> Manual roaming is the only form of roaming that is available when there is no pre-existing contractual relationship between a subscriber, or her home system, and the system on which she wants to roam. See *Reexamination NPRM*, 20 FCC Rcd at 15049 ¶ 3.

<sup>8</sup> This form of roaming is sometimes referred to as "seamless" roaming. However, some parties understand "seamless" roaming to include handoff of calls in progress as one moves from the service area of one provider to another. For the sake of clarity, we use the term "automatic" roaming to refer to origination and termination of calls without the need for any special facilitating action by the subscriber. See *Reexamination NPRM*, 20 FCC Rcd at 15049 ¶ 3.

subscriber's home system and the host system.<sup>9</sup>

7. *1981 Manual Roaming Order.* The Commission first adopted roaming requirements in 1981 as part of the original cellular service rules.<sup>10</sup> Under these rules, cellular carriers were required to offer manual roaming.<sup>11</sup> The Commission determined that requiring cellular carriers to provide roaming would further the public interest in providing, to the greatest extent possible, a "nationwide high-capacity mobile communications service capable of providing local and roaming mobile telephone users the ability to place and receive calls."<sup>12</sup> In 1994, after passage of the Omnibus Budget Reconciliation Act (OBRA) of 1993,<sup>13</sup> the Commission undertook a comprehensive review of CMRS-related issues, including roaming. The Commission considered among other issues, whether "the obligation to permit roaming should be extended to all CMRS" and inquired as to the regulatory standard necessary to promote roaming.<sup>14</sup>

8. *1996 Manual Roaming Order and Further Notice.* In 1996, the Commission extended its original cellular roaming rules to the Broadband Personal Communications Service (PCS) and the Specialized Mobile Radio Service (SMR), the other CMRS carriers at that time that were competing with cellular in the provision of real-time, two-way voice services.<sup>15</sup> The Commission's decision began by noting that Sections 201(b) and 202(a) of the Communications Act, which govern common carrier communications services, are applicable to CMRS providers.<sup>16</sup> The Commission rejected BellSouth's argument that "roaming was merely a billing arrangement and not a common carrier service."<sup>17</sup> The Commission stated that "[r]oaming capability . . . gives end users access to a foreign network in order to communicate messages of their own choosing. We therefore agree with those commenters that argue that roaming is a common carrier service."<sup>18</sup> The Commission also reasoned that roaming met the statutory

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<sup>9</sup> See *id.* See also *2000 CMRS Roaming NPRM*, 15 FCC Rcd at 21629-30 ¶ 4; *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9465-66 ¶ 6.

<sup>10</sup> See *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, CC Docket No. 79-318, *Report and Order*, 86 FCC 2d 469 (1981) (*Cellular Report & Order*) (adopting requirement in then Section 22.911(b) of the Commission's rules that base stations render service to properly licensed roamers).

<sup>11</sup> See 47 C.F.R. § 22.901 (1995); 47 C.F.R. § 22.911(b) (1981).

<sup>12</sup> See *Cellular Report & Order*, 86 FCC 2d at 490 ¶ 75.

<sup>13</sup> See Omnibus Budget Reconciliation Act of 1993, Title VI, § 6002(b)(2)(A), (B), (OBRA), 47 U.S.C. §§ 303(n), 332; Communications Act of 1934 as amended (Communications Act) §§ 203, 204, 205, 211, 212, and 214. Section 332 defines CMRS as "any mobile service . . . 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." Communications Act, § 332(d)(1), 47 U.S.C. § 332(d)(1).

<sup>14</sup> See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9465 ¶ 4 (citing Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, *Notice of Proposed Rule Making and Notice of Inquiry*, 9 FCC Rcd 5408 (1994) and *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, *Second Notice of Proposed Rule Making*, 10 FCC Rcd 10666 (1995)).

<sup>15</sup> See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9464 ¶ 2, 9470-71 ¶¶ 12-14. The Commission stated that "we conclude that the public interest will be served by extending our existing manual roaming rule, which is part of our cellular service rules, to obligate all CMRS licensees competing in the mass market for real-time, two-way voice services and to protect the subscribers of all carriers offering such services. That group consists of cellular, broadband PCS and covered SMR providers." See *id.* at 9470 ¶ 12.

<sup>16</sup> See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9468-69 ¶ 10.

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

<sup>18</sup> *Id.*

requirements of CMRS and, by that statutory definition, could be considered to be offered as a common carrier service -- *i.e.*, interconnected and offered for profit to a substantial segment of the public.<sup>19</sup> The Commission also noted that it had the statutory authority to impose a roaming requirement as a licensing condition.<sup>20</sup> The Commission, thus, set out the two pillars of its statutory authority with respect to roaming under Title II and III of the Act.

9. The Commission then conditioned the grant of cellular, broadband PCS, and covered SMR licenses under Sections 303(r) and 309 of the Act on compliance with its manual roaming rule.<sup>21</sup> The Commission also discussed its manual roaming regulation in the context of the broader general obligations that CMRS providers have as common carriers. The Commission reminded all CMRS carriers that, irrespective of their regulatory obligations for manual roaming, they would still be subject to the complaint process of Section 208, stating “[a]llegations that particular practices by non-covered CMRS providers [*i.e.*, those not covered by the extended manual roaming rule] are unjust, unreasonable or otherwise in violation of the Communications Act would be grounds for complaint under Section 208 of that Act.”<sup>22</sup>

10. The Commission, however, declined to adopt an automatic roaming rule at that time.<sup>23</sup> The Commission stated that the record on this issue was “inconclusive” and decided to seek comment on the issue in a related *Third Notice of Proposed Rulemaking (Third NPRM)*.<sup>24</sup> As part of the *Third NPRM*, the Commission sought comment on whether it should require carriers to provide “automatic” roaming on a non-discriminatory basis. The Commission also specifically sought additional comment on whether it should require cellular, broadband PCS and certain covered SMR licensees that enter into automatic roaming agreements to make like agreements available to similarly situated providers, where technically compatible handsets are being used, under nondiscriminatory rates, terms, and conditions.<sup>25</sup>

11. *2000 Rulemakings*. In August 2000, in a *Memorandum Opinion and Order*, the Commission generally affirmed the manual roaming requirement it had adopted in 1996, while modifying the definition under which CMRS providers were “covered” and extending the rule’s application to certain data providers.<sup>26</sup> Thus, the manual roaming requirement, as amended, applies to all cellular, broadband PCS, and SMR providers that “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 provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls.”<sup>27</sup> In this order,

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<sup>19</sup> The Commission noted that roaming meets all the statutory elements of commercial mobile radio service, and therefore, of common carriage: “roaming satisfies the statutory elements of CMRS, and is thus a common carrier service, because it is (1) an interconnected mobile service (2) offered for profit (3) in such a manner as to be available to a substantial portion of the public.” *See id.* at 9469 ¶ 10 n.30 (citing 47 U.S.C. § 332(d)(1)).

<sup>20</sup> *Id.* at 9469 ¶ 10.

<sup>21</sup> *Id.* at 9471 ¶ 13.

<sup>22</sup> *Id.* at 9472 ¶ 14.

<sup>23</sup> *See id.* at 9472 ¶ 16.

<sup>24</sup> *Interconnection and Resale Obligations Third NPRM*, 11 FCC Rcd at 9473 ¶ 17.

<sup>25</sup> *Interconnection and Resale Obligations Third NPRM*, 11 FCC Rcd at 9475 ¶ 22.

<sup>26</sup> *See Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, *Third Report and Order and Memorandum Opinion and Order on Reconsideration*, 15 FCC Rcd 15975 (2000) (“*Interconnection and Resale Obligations Third Report and Order*” and “*Interconnection and Resale Obligations MO&O*,” respectively).

<sup>27</sup> *See Interconnection and Resale Obligations Third Report and Order*, 15 FCC Rcd at 15990 ¶ 18.

the Commission terminated consideration of the automatic roaming issues raised in the *Third NPRM*, finding that subsequent developments in the market and technology had rendered the record stale.<sup>28</sup>

12. Subsequently, in November 2000, the Commission initiated a new proceeding to consider whether the Commission should adopt an automatic roaming rule that would apply to CMRS systems and whether the Commission should sunset the manual roaming requirement that currently applies to those systems.<sup>29</sup> In the *Notice of Proposed Rulemaking (2000 NPRM)*, the Commission specifically sought comment on: (1) whether to adopt an automatic roaming rule and if so, how such a requirement should be designed and implemented; and (2) whether the existing manual roaming rule and/or any automatic roaming rule that might be adopted should sunset and, if so, when.

13. Since the *2000 NPRM*, the Commission has discussed roaming issues in the context of its review and consideration of several wireless mergers, including Cingular/AT&T Wireless, ALLTEL/Western Wireless, and Sprint/Nextel. In the Cingular/AT&T Merger Order, the Commission explicitly based its analysis of roaming issues on “the potential harm to consumers of mobile telephony services, rather than to mobile telephony providers.”<sup>30</sup> The Commission found that competition in the retail market is sufficient to protect consumers against potential harm arising from intercarrier roaming arrangements and practices, stating that “an overall disciplinary force in the context of the intercarrier market for roaming services is that customers of various firms always have the option to switch to firms employing other air interfaces.”<sup>31</sup> In the ALLTEL/Western Wireless and Sprint/Nextel orders, the Commission noted that if a roaming partner believes that ALLTEL or Sprint is charging unreasonable roaming rates, it can file a complaint with the Commission under Section 208 of the Communications Act.<sup>32</sup> The Commission recognized, however, that the manual roaming requirement and the ability to file a Section 208 complaint may not fully address the concerns raised by the commenters. Given the broad scope of some of the competitive concerns raised in the mergers, many of which seemed to call for a reevaluation of the Commission’s roaming rules and policies, the Commission determined that it was appropriate to address those concerns in the context of a rulemaking proceeding to consider the Commission’s roaming rules and requirements applicable to CMRS providers under current market conditions and developments in technology.<sup>33</sup>

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<sup>28</sup> *Id.* at 15982-83 at ¶¶ 22-24.

<sup>29</sup> See *2000 CMRS Roaming NPRM, supra*, n. 5.

<sup>30</sup> See Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, WT Docket No. 04-70, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21588 ¶ 172 (2004) (“*Cingular-AT&T Wireless Order*”).

<sup>31</sup> See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21591 ¶ 180.

<sup>32</sup> See Applications of Western Wireless Corporation and ALLTEL Corporation, WT Docket No. 05-50, *Memorandum Opinion and Order*, 20 FCC Rcd 13053, 13093 ¶ 109 (2005) (“*ALLTEL-WWC Order*”); Applications of Nextel Communications, Inc. and Sprint Corporation, WT Docket No. 05-63, *Memorandum Opinion and Order*, 20 FCC Rcd 13967, 13093, 14012-13 ¶ 127 (2005) (*Sprint Nextel Order*). See also Applications of Nextel Partners, Inc., Transferor, and Nextel WIP Corp. and Sprint Nextel Corporation, Transferees, for Consent to Transfer Control of Licenses and Authorizations, File Nos. 0002444650, 0002444656, 0002456809, *Memorandum Opinion and Order*, 21 FCC Rcd 7358 (2006) (denying SouthernLINC’s request that approval of the transaction be conditioned on the requirement that Sprint Nextel provide automatic roaming for iDEN voice, digital dispatch and data services at reasonable/non-discriminatory rates and terms).

<sup>33</sup> See *ALLTEL-WWC Order*, 20 FCC Rcd at 13093 ¶ 109. In approving these merger proposals, the Commission noted that “our manual roaming rule requires other carriers to complete calls initiated by Cingular’s [ALLTEL’s or Sprint’s] customers where Cingular [ALLTEL or Sprint] cannot because it has neither its own signal nor an automatic agreement.” See, e.g., *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21592 ¶ 182; *ALLTEL-WWC Order*, 20 FCC Rcd 13053 at 13093 ¶ 108; and *Sprint Nextel Order*, 20 FCC Rcd at 14012-13 ¶ 127. In addition, to (continued....)

14. *2005 Reexamination NPRM*. In August 2005, the Commission released a *Memorandum Opinion and Order and Notice of Proposed Rulemaking (Reexamination NPRM)*, which terminated the pending *2000 NPRM* and initiated a new proceeding to re-examine whether the Commission's current rules regarding roaming requirements applicable to CMRS providers should be modified given the current state of the CMRS market.<sup>34</sup>

15. In the *Reexamination NPRM*, the Commission sought to develop a record, with up-to-date information on the state of roaming in today's CMRS marketplace, in order to determine what regulatory regime would be appropriate for roaming services.<sup>35</sup> The *Reexamination NPRM* sought comment on issues related to manual and automatic roaming, including issues concerning roaming negotiations, regional and rural carrier's concerns, technical considerations, and the impact of recently approved mergers on the availability of roaming services.<sup>36</sup> The *Reexamination NPRM* asked commenters to discuss in detail, and provide economic analysis on, whether changes in the CMRS industry have had any positive or negative effect on the availability of roaming to consumers.<sup>37</sup>

16. In response to the *Reexamination NPRM*, twenty one parties filed comments and twenty four parties filed reply comments.<sup>38</sup> The record represents all segments of the CMRS industry, including nationwide carriers, regional and small carriers, trade associations, and cooperatives. A number of commenters included economic testimony analyzing the CMRS marketplace in terms of the availability of roaming services and prices.<sup>39</sup> In addition to filing comments, a number of parties made *ex parte* presentations to Commission staff.

17. *Section 403 Petition*. On April 25, 2006, AIRPEAK, Airtel, Cleveland Unlimited, Leap, MetroPCS, Punxsutawney, RTG, and SouthernLINC ("Petitioners"), filed a Joint Section 403 Petition requesting that the Commission affirmatively regulate automatic roaming. Petitioners contend that the record in the roaming proceeding does not contain sufficient specific concrete data on roaming rates and practices, and they ask the Commission to initiate an inquiry for the purpose of gathering and inspecting a

(Continued from previous page)

further ensure compliance, the Commission stated that "we adopt as a condition to our grant in this Order a reciprocal duty, *i.e.*, that Cingular [ALLTEL or Sprint] may not prevent its customers from reaching another carrier and completing their calls in these circumstances, unless specifically requested to do so by a subscriber. Finally in the future, if a roaming partner believes that Cingular [ALLTEL or Sprint] is charging unreasonable roaming rates, it can always file a complaint with the Commission under Section 208 of the Communications Act." See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21592 ¶ 182; *ALLTEL-WWC Order*, 20 FCC Rcd at 13093 ¶ 108; and *Sprint Nextel Order*, 20 FCC Rcd at 14012-13 ¶ 127.

<sup>34</sup> Because the record was stale, the Commission terminated the then-pending automatic roaming NPRM proceeding, and initiated the current proceeding. See *Reexamination NPRM*, 20 FCC Rcd at 15055 ¶¶ 18-19.

<sup>35</sup> *Reexamination NPRM*, 20 FCC Rcd at 15048 at ¶ 1.

<sup>36</sup> *Id.* at 15058-59 ¶¶ 23-24, 27-32, 36.

<sup>37</sup> *Id.* at 15059 ¶ 36.

<sup>38</sup> See *infra* Appendix B.

<sup>39</sup> See expert economic analysis provided by Reply Comments of Harold W. Furchtgott-Roth on behalf of T-Mobile (Furchtgott-Roth/T-Mobile Reply Comments); Comments and Reply Comments of R. Preston McAfee on behalf of SouthernLINC (McAfee/SouthernLINC Comments and Reply Comments); ERS Group Comments on behalf of Leap (ERS Group/Leap Comments); Comments and Reply Comments of Gregory L. Rosston on behalf of Sprint Nextel (Rosston/Sprint Nextel Comments and Reply Comments); Thomas W. Hazlett Reply Comments on behalf of Cingular Reply Comments (Hazlett/Cingular Reply Comments); David S. Sibley on behalf of Leap Reply Comments (Sibley/Leap Reply Comments).

representative sample of wireless carriers roaming agreements on a confidential basis.<sup>40</sup> On May 5, 2006, Oppositions to the Joint Petition were filed by Cingular, Sprint/Nextel and Verizon Wireless.<sup>41</sup> On May 12, 2006, the Petitioners filed a Reply to Oppositions.<sup>42</sup>

### III. REPORT AND ORDER

18. In this Report and Order, we first find that automatic roaming is a common carrier obligation pursuant to Sections 201 and 202 of the Communications Act, and then discuss the scope of the automatic roaming obligation for CMRS carriers. We decline to regulate the automatic roaming rates, instead allowing the rates to be freely determined through negotiations between the carriers based on competitive market forces. Next, we address other issues raised by commenters in the record, including a request for “most favored” roaming partner rates for Tier IV CMRS carriers, in-market or home roaming issues, access to non-interconnected features and enhanced digital networks, and public filing of roaming rates. In addition, we codify the automatic roaming obligations into a rule, imposing an affirmative obligation to provide automatic roaming on CMRS carriers. We also deny the petition for investigation pursuant to Section 403 of the Act. Finally, we decline to sunset the manual roaming rule at this time.

#### A. AUTOMATIC ROAMING OBLIGATIONS

##### 1. Automatic Roaming

###### a. Background

19. In the *Reexamination NPRM*, the Commission initiated a new proceeding to reexamine the state of roaming in the CMRS marketplace and whether CMRS providers should be subject to roaming obligations.<sup>43</sup> Noting that there had been recent changes in technologies and mobile telephony markets, the Commission sought up-to-date information on automatic roaming that would enable the Commission to fully consider the question and reach an informed decision about whether to adopt an automatic roaming rule.<sup>44</sup> Particularly, the Commission was interested in the effects that the existing roaming environment has on U.S. consumers.<sup>45</sup> Interested parties were invited to discuss in detail whether, in the absence of an automatic roaming requirement, there have been any CMRS industry changes and trends that have positively or negatively affected the availability of roaming to consumers.<sup>46</sup> Commenters were also asked to address both the potential benefits of various regulatory options and the potential costs. In addition, the Commission invited commenters to provide economic analysis and data regarding the potential benefits and costs of imposing an automatic roaming rule.<sup>47</sup> Finally, the Commission requested generally that commenters submit comments on any issues they believed important for the Commission to consider as it determined whether the public interest would be service by placing an automatic roaming

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<sup>40</sup> See Joint Petition for Commission Inquiry Pursuant to Section 403 of the Communications Act, WT Docket No. 05-265, (filed Apr. 25, 2006) (“Joint Petition”). See also *infra* Appendix B (list of Joint Section 403 Petitioners and commenters).

<sup>41</sup> See Cingular Opposition to Joint Petition for Commission Inquiry, WT Docket No. 05-265, filed May 5, 2006; Sprint Nextel Opposition to Joint Petition for Section 403 Investigation, WT Docket No. 05-265, filed May 5, 2006; Verizon Wireless Opposition to Joint Petition for Commission Inquiry, WT Docket No. 05-265, filed May 5, 2006.

<sup>42</sup> See Joint Petitioner’s Reply to Oppositions, WT Docket No. 05-265, filed May 12, 2006.

<sup>43</sup> See *Reexamination NPRM*, 20 FCC Rcd. at 15055 ¶ 20.

<sup>44</sup> See *id.* at 15057 ¶ 25.

<sup>45</sup> See *id.* at 15058 ¶ 27.

<sup>46</sup> See *id.* at 15057 ¶ 25.

<sup>47</sup> See *id.* at 15058 ¶ 28.



requirement on CMRS providers.<sup>48</sup>

20. In the *Reexamination NPRM*, the Commission suggested one possible automatic roaming rule would require, as a condition of license, CMRS providers to enter into roaming agreements with other such providers where technically compatible handsets are being used, under non-discriminatory rates, terms, and conditions.<sup>49</sup> The Commission sought comment on whether a non-discriminatory approach to automatic roaming is appropriate in the current marketplace, or whether any other approaches should be considered.<sup>50</sup> To the extent that a CMRS provider refuses to enter an automatic roaming agreement, the Commission also sought comment on the adequacy of remedies available under existing law, such as Sections 201, 202, 208, 251, and 332 of the Act.<sup>51</sup>

21. In response to the *Reexamination NPRM*, many smaller and regional carriers urge the Commission to adopt an automatic roaming rule and affirm that CMRS carriers have an affirmative obligation to provide roaming service to other carriers on a just, reasonable, and non-discriminatory basis.<sup>52</sup> Leap argues that the Commission should adopt rules in order to facilitate enforcement of the common carrier obligations and promote competition.<sup>53</sup> In addition, Centennial and other small carriers contend that the Commission should ensure that roaming rates are reasonable and guard against discrimination in the rates, terms and conditions under which roaming is provided by CMRS carriers.<sup>54</sup> RCA and SouthernLINC further argue that the Commission should require carriers to enter into good faith negotiation for automatic roaming.<sup>55</sup> Some of the commenters urge the Commission to adopt specific rules regarding carriers' roaming obligations, while others request only that the Commission provide general guidance regarding the nature of providers' roaming obligations and then leave it to marketplace to determine what constitutes "reasonable terms" under roaming agreements.<sup>56</sup> We also note that in its recent comments in another proceeding, the Navajo Nation argues that a better incentive for rural roaming must be established because, in rural areas such as Indian reservation lands, they contend

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<sup>48</sup> See *id.* at 15059 ¶ 31.

<sup>49</sup> See *Reexamination NPRM*, 20 FCC Rcd at 15059-60 ¶ 33; *Interconnection and Resale Obligations Third NPRM*, 11 FCC Rcd at 9475 ¶ 22. This rule had been suggested in the *2000 CMRS NPRM*, *supra* n. 5, as well as in the *Interconnection and Resale Obligations Third NPRM*, *supra* n. 2.

<sup>50</sup> See *Reexamination NPRM*, 20 FCC Rcd at 15059-60 ¶ 33.

<sup>51</sup> See *id.* at 15060 ¶ 34. A variety of parties in CC Docket No. 94-54 contended that existing remedies were sufficient. In CC Docket No. 94-54, *see, e.g.*, Bell Atlantic Comments at 7-8 and RTG Comments at 4.

<sup>52</sup> See generally Leap Comments; SLO Cellular Comments; MetroPCS Comments; SouthernLINC Comments; Safety and Frequency Equity Competition Coalition (SAFE) Comments; NY3G Partnership (NY3G) Comments; Comments of Organization for the Promotion Advancement of Small Telecommunications Companies (RTG/OPASTCO), Alaska Native Broadband 1 License, LLC (ANB), Centennial, John Staurulakis, Inc. (JSI), Unicom, National Telecommunications Cooperative Association (NTCA), ACS Wireless, Inc. (ACS), AIRPEAK Communications, LLC and Airtel Wireless, LLC, Joint Comments (AIRPEAK/Airtel Joint Comments), North Dakota Network Company (NDNC), NTCA, RCA, Cleveland Unlimited, Inc. (Cleveland Unlimited), Punxsutawney Communications (Punxsutawney), Suncom Wireless (Suncom).

<sup>53</sup> Leap Reply Comments at 6.

<sup>54</sup> ANB Comments at 1-2; Centennial Reply Comments at 8-10; JSI Reply Comments at 1-2; Unicom Reply Comments at 1-2; and SAFE Comments at 3.

<sup>55</sup> See RCA Comments at 3-5; SouthernLINC Comments at 53-54.

<sup>56</sup> See, *e.g.*, Centennial Comments at 11.

that often only a single service provider is available.<sup>57</sup> The Navajo Nation believes that mandatory roaming would result in more competitive pricing and services for consumers in these rural areas.<sup>58</sup>

22. In contrast, nationwide carriers and others oppose any automatic roaming regulation, arguing that automatic roaming agreements have proliferated without Commission action. They contend that allowing market forces to operate freely without regulation has resulted in low roaming rates and near nationwide coverage for many carriers.<sup>59</sup> Also, these commenters argue that a mandatory automatic roaming requirement would stifle the incentive for carriers to provide facilities-based coverage, innovative rate plans, and better quality services at lower costs.<sup>60</sup>

#### b. Discussion

23. We clarify that automatic roaming is a common carrier service, subject to the protections outlined in Sections 201 and 202 of the Communications Act. If a CMRS carrier receives a reasonable request for automatic roaming, pursuant to Section 332(c)(1)(B) and Section 201(a), it is desirable and serves the public interest for that CMRS carrier to provide automatic roaming service on reasonable and non-discriminatory terms and conditions.<sup>61</sup> As discussed below, services that are covered by the automatic roaming obligation are limited to real-time, two-way switched voice or data services, provided by CMRS carriers, that are interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls. These findings are consistent with the Commission's previous determinations.<sup>62</sup>

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<sup>57</sup> See Navajo Nation Telecommunications Regulatory Commission Comments filed in WT Docket No. 06-156, Biennial Regulatory Review – Amendments to Streamline and Harmonize Various Rules Affecting Wireless Radio Services: Wireless Telecommunications Bureau, Navajo Nation Telecommunications Regulatory Commission Comments at 5 (“Navajo Nation Streamlining Comments”).

<sup>58</sup> See Navajo Nation Streamlining Comments at 5. The Navajo Nation also argues that roaming should be universally mandated for services provided via a federally-subsidized telecom project, and there should be no charge for roaming services to customers utilizing services from these projects. See Navajo Nation Streamlining Comments at 5.

<sup>59</sup> See, e.g., Cingular Comments at 12-30; Cingular Reply Comments at 3-8; Nextel Partners Comments at 5-9; Sprint Nextel Comments at 17-21; Sprint Nextel Reply Comments at 9-11; T-Mobile Comments at 3-6; T-Mobile Reply Comments at 4-5; Verizon Wireless Comments at 17-21; Verizon Wireless Reply Comments at 20-24; Alltel Reply Comments at 1-2; Edge Reply Comments at 6-9.

<sup>60</sup> See, e.g., Cingular Comments at 22-25; Nextel Partners Comments at 6-9; Sprint Nextel Comments at 20; Alltel Reply Comments at 6-8.

<sup>61</sup> See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9463 ¶ 2. Under Section 201(a) of the Act, common carriers must provide service “upon reasonable request,” and the Commission has authority to order interconnection among carriers if it finds it necessary or desirable in the public interest. See 47 U.S.C. § 201(a). Section 201(b) requires that all charges, practices, classifications, and regulations for common carrier service be just and reasonable and provides that any charge, practice, classification, and regulation that is unjust and unreasonable is unlawful. See 47 U.S.C. § 201(b). Section 202(a) prohibits unjust or unreasonable discrimination in charges, practices, classifications, and services by common carriers in connection with any “like” communications service and also prohibits undue or unreasonable preferences or advantages. See 47 U.S.C. § 202(a). Section 208 provides that complaints may be filed with the Commission against common carriers subject to the Act. See 47 U.S.C. § 208.

<sup>62</sup> See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9469 ¶10 and 9472 ¶16 (stating that roaming is a common carrier service and extending the application of manual roaming rule to certain CMRS carriers (cellular, broadband PCS and covered SMR) competing in the mass market for real-time, two-way voice services and to protect the subscribers of all carriers offering such services). See also *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9463-71 ¶¶ 1-14.

24. Until our actions today, the Commission has not expressly addressed whether, under Sections 201 and 202 of the Act, it is desirable and necessary to provide automatic roaming upon reasonable request. Nor has it expressly stated that automatic roaming is a common carrier service. Moreover, it has not adopted an automatic roaming rule. As a result, the record before us demonstrates that it is not clear to some of the parties in this proceeding whether the provisioning of automatic roaming is a common carrier service or to what extent the requirements of Sections 201 and 202 of the Communications Act apply to automatic roaming.<sup>63</sup> In addition, commenters expressed differing views on the scope of carriers and spectrum bands to which any automatic roaming obligations may apply.<sup>64</sup> We address and clarify these matters in the discussion that follows.

25. As previously determined, roaming is a common carrier service, because roaming capability gives end users access to a foreign network in order to communicate messages of their own choosing.<sup>65</sup> In finding that roaming is a common carrier service, the Commission noted the contrast between roaming and services such as billing and collection offered by local exchange carriers (LECs) and interexchange carriers (IXCs), which are not common carriage because they do “not allow customers of the service . . . to communicate or transmit intelligence of their own design and choosing,” and because they can be offered by non-communications entities such as credit card companies.<sup>66</sup> The Commission also found that roaming satisfies all the statutory elements of commercial mobile radio service,<sup>67</sup> and “is thus a common carrier service, because it is (1) an interconnected mobile service (2) offered for profit (3) in such a manner as to be available to a substantial portion of the public.”<sup>68</sup> As explained earlier, there are two forms of roaming -- manual and automatic. We find that both forms of roaming are common carrier services because both forms of roaming capability give end users access to a foreign network in order to communicate messages of their own choosing.<sup>69</sup>

26. Further, under section 332 of the Communications Act, CMRS providers are subject to common carrier regulations. Section 332(c)(1)(A) provides that a “person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is engaged, be treated as a common carrier,”<sup>70</sup> and subsection (c)(1)(B) states that, “[u]pon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of Section 201 of this Title.”<sup>71</sup> Like any other common carrier service offering, if a CMRS provider offers automatic roaming, it triggers its common

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<sup>63</sup> See AIRPEAK/Airtel Joint Comments at 8; Centennial Comments at 11; Leap Comments at 17-18; MetroPCS Comments at 21; NY3G Comments at 4; SLO Cellular Comments at 2; SouthernLINC Comments at 24-25.

<sup>64</sup> See e.g., NY3G Partnership Comments at 3-5; SAFE Comments at 2-3.

<sup>65</sup> See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9469 ¶ 10.

<sup>66</sup> See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9469 ¶ 10 (citing *Detariffing of Billing and Collection Services*, CC Docket No. 85-88, *Report and Order*, 102 FCC 2d 1150 (1986)).

<sup>67</sup> 47 U.S.C. § 332(d).

<sup>68</sup> See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9469 ¶ 10 n.30 (citing 47 U.S.C. § 332(d)(1)).

<sup>69</sup> See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9469 ¶ 10. We note that with manual roaming, the subscriber must establish a relationship directly with the host carrier on whose system he or she wants to roam in order to make a call. Automatic roaming, however, requires a pre-existing contractual agreement between the subscriber’s home system and the host system. In other words, the request for automatic roaming has to be done by the subscriber’s carrier on behalf of the subscriber to enable the subscriber to roam.

<sup>70</sup> 47 U.S.C. § 332(c)(1)(A).

<sup>71</sup> 47 U.S.C. § 332(c)(1)(B).

carrier obligations with respect to the provisioning of that service under the Communications Act. We determine that, if a CMRS carrier receives a reasonable request for automatic roaming, pursuant to Section 332(c)(1)(B) and Section 201(a), it is desirable and necessary to serve the public interest for that CMRS carrier to provide automatic roaming service on reasonable and non-discriminatory terms and conditions.<sup>72</sup>

27. The record demonstrates that automatic roaming is currently widespread due, in large part, to the offering of nationwide and regional calling plans.<sup>73</sup> As the Commission has previously noted, automatic roaming is far more convenient for a subscriber than manual roaming and, as a practice, has become increasingly widespread.<sup>74</sup> Today, most wireless customers expect to roam automatically on other carriers' networks when they are out of their home service area. Accordingly, we recognize that automatic roaming benefits mobile telephony subscribers by promoting seamless CMRS service around the country, and reducing inconsistent coverage and service qualities.<sup>75</sup>

28. Given the current CMRS market situation and wireless customer expectations, we find it is in the public interest to facilitate reasonable roaming requests by carriers on behalf of wireless customers, particularly in rural areas.<sup>76</sup> In other words, in order to enable its subscribers to receive service seamlessly, a CMRS carrier may make an automatic roaming request on behalf of its subscribers. If the request is reasonable, then the would-be host carrier cannot refuse to negotiate an automatic roaming agreement with the requesting carrier.<sup>77</sup> Many smaller and regional carriers -- many in rural areas -- urge the Commission to confirm that CMRS carriers have an obligation to provide automatic roaming services to other carriers for the benefit of their subscribers on a just, reasonable, and non-discriminatory basis.<sup>78</sup> We are mindful of the ongoing complaints by small, regional and rural carriers against the nationwide carriers that, under current market conditions, it is getting more difficult for small and rural carriers to obtain access to nationwide carriers' networks through automatic roaming agreements.<sup>79</sup> For example, RTG reports that "small rural carriers have experienced a spike in the cost for their customers to roam on the nationwide carriers' network and an increased unwillingness by the nationwide carriers to enter into roaming agreements or renew existing ones."<sup>80</sup> Both Airpeak and SouthernLINC also describe the

<sup>72</sup> See *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9463 ¶ 2.

<sup>73</sup> MetroPCS Comments at 21. See also 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, *Eleventh Report*, 21 FCC Rcd 10947 (2006) ("*Eleventh Report*").

<sup>74</sup> See *ALLTEL-WWC Order*, 20 FCC Rcd at 13090 ¶ 101.

<sup>75</sup> See ACS Comments at 1-2; SLO Cellular Reply Comments at 5; Navajo Nation Comments in WT Docket No. 06-156 at 5.

<sup>76</sup> See 47 U.S.C. §§ 301, 303(c), 332.

<sup>77</sup> The obligation to provide automatic roaming is not reciprocal. Upon reasonable request, a host carrier is only required to provide automatic roaming to the subscribers of the requesting carrier. A reasonable request does not trigger any obligation for the host carrier to provide roaming for its own subscribers on the requesting carrier's network, or to negotiate a roaming agreement with the requesting carrier regarding such services.

<sup>78</sup> See generally, Leap Comments; SLO Cellular Comments; MetroPCS Comments; SouthernLINC Comments; SAFE Comments; NY3G Comments; RTG/OPASTCO Comments, ANB Comments, Centennial Comments, JSI Comments, Unicom Comments, NTCA Comments, ACS Comments, AIRPEAK/Airtel Joint Comments, NDNC Comments, NTCA Comments, RCA Comments, Cleveland Unlimited Comments, Punxsutawney Comments, Suncom Comments.

<sup>79</sup> See, e.g., RTG Comments at 10; Leap Reply Comments at 7; Airpeak Comments at 6-8; and SouthernLINC Comments at 11-15.

difficulties they have had obtaining roaming agreements from Sprint/Nextel and Nextel Partners.<sup>81</sup> Our clarification that automatic roaming, as a common carrier service, is subject to protections outlined in Sections 201 and 202 of the Communications Act takes into account these public interest concerns and ensures that, ultimately, subscribers receive automatic roaming on just, reasonable and non-discriminatory terms. We also note that this clarification will alleviate some of the general concerns about roaming and roaming practices in the CMRS market that were raised previously in the context of the Commission's review and consideration of several wireless mergers, including Cingular/AT&T Wireless, ALLTEL/Western Wireless, and Sprint/Nextel.<sup>82</sup>

29. Additionally, we determine that a reasonable request for automatic roaming will be limited to real-time, two-way switched voice or data services, provided by CMRS carriers, that are interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls.<sup>83</sup> This ensures that all CMRS providers competing in the mass market for real-time, two-way voice and data services are similarly obligated to provide automatic roaming services, thereby equally benefiting all subscribers of mobile telephony services who seek to roam seamlessly over CMRS networks. We also conclude, as we have in prior proceedings, that an important indicator of a provider's ability to compete with other CMRS providers is whether the provider's system has "in-network" switching capability.<sup>84</sup> In-network switching facilities accommodate the reuse of frequencies in different portions of the same service area, thus enabling any CMRS provider to offer interconnected service to a larger group of customers and compete directly with other CMRS providers in the mass consumer market.<sup>85</sup>

30. *Complaint Procedures.* Based on our finding that automatic roaming is a common carrier service, we determine that the provisioning of automatic roaming service is subject to Section 208 which provides that complaints may be filed with the Commission against common carriers subject to the Communications Act.<sup>86</sup> As discussed above and noted in the record, there has been some confusion regarding whether the provisioning of automatic roaming services is subject to the requirements of

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<sup>80</sup> See RTG Comments at 10; Leap Reply Comments at 7.

<sup>81</sup> See Airpeak Comments at 6-8; SouthernLINC Comments at 11-15.

<sup>82</sup> In approving the merger proposals and addressing concerns raised by smaller carriers, the Commission noted that "our manual roaming rule requires other carriers to complete calls initiated by Cingular's [ALLTEL's or Sprint's] customers where Cingular [ALLTEL or Sprint] cannot because it has neither its own signal nor an automatic agreement." See, e.g., *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21592 ¶ 182; *ALLTEL-WWC Order*, 20 FCC Rcd 13093 at ¶ 108; and *Sprint Nextel Order*, 20 FCC Rcd at 14012-13 ¶ 127. In addition, to further ensure compliance, the Commission stated that "we adopt as a condition to our grant in this Order a reciprocal duty, i.e., that Cingular [ALLTEL or Sprint] may not prevent its customers from reaching another carrier and completing their calls in these circumstances, unless specifically requested to do so by a subscriber. Finally in the future, if a roaming partner believes that Cingular [ALLTEL or Sprint] is charging unreasonable roaming rates, it can always file a complaint with the Commission under Section 208 of the Communications Act." See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21592 ¶ 182; *ALLTEL-WWC Order*, 20 FCC Rcd 13053 at ¶ 108; and *Sprint Nextel Order*, 20 FCC Rcd at 14012-13 ¶ 127.

<sup>83</sup> See *infra* section III.B.3 (non-interconnected services discussion). See also 47 U.S.C. §§ 153 and 332.

<sup>84</sup> See *Interconnection and Resale Obligations MO&O*, 15 FCC Rcd at 15980 ¶ 15; *Telephone Number Portability Second Memorandum Opinion and Order on Reconsideration*, 13 FCC Rcd 21204, 21228-30 ¶¶ 52-57 (1998); *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Memorandum Opinion and Order*, 12 FCC Rcd 22665, 22703-04 ¶¶ 76-78.

<sup>85</sup> *Interconnection and Resale Obligations MO&O*, 15 FCC Rcd at 15980 ¶ 15.

<sup>86</sup> See 47 U.S.C. § 208.

Section 208.<sup>87</sup> Given the fact-specific nature of the roaming issues that have come to light during this proceeding and several merger proceedings, we conclude that many disputes involving automatic roaming services would be best resolved through an adjudicatory process.<sup>88</sup> In deciding roaming complaints, we will consider whether a request is reasonable or whether the activity complained of is unjust and unreasonable based on the totality of the circumstances of the case.<sup>89</sup> When roaming-related complaints are filed, we intend to address them expeditiously on a case-by-case basis.

31. Further, we note that the Accelerated Docket procedure, including pre-complaint mediation, is available to roaming complaints.<sup>90</sup> Several commenters – including parties both supporting and opposing adoption of an automatic roaming rule – requested use of the Commission’s Accelerated Docket procedures to resolve roaming complaints.<sup>91</sup> Although all roaming complaints will not automatically be placed on the Accelerated Docket, an affected carrier can seek consideration of its complaint under the Commission’s Accelerated Docket rules and procedures where appropriate.

32. Some commenters requested that the Commission amend the Accelerated Docket procedure rules such as giving Commission staff delegated authority to decide roaming proceedings on the Accelerated Docket.<sup>92</sup> We note that when the Commission adopted the Accelerated Docket rules, it stated that “[c]ertain categories of issues that arise in Accelerated Docket proceedings will properly be the

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<sup>87</sup> See AIRPEAK/Airtel Joint Comments at 8; Centennial Comments at 11; Leap Wireless Comments at 17-18; MetroPCS Comments at 21; NY3G Comments at 4; SLO Cellular Comments at 2; SouthernLINC Comments at 24-25.

<sup>88</sup> See, e.g., RCA Comments at 3-5 (calling for adoption of good-faith negotiation process similar to that required under SHVIA). Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues, *First Report and Order*, 15 FCC Rcd 5445, 5448 ¶ 6 (2000) (*SHVIA Order*) (stating, in the broadcast retransmission consent context, that a broadcaster could not refuse to negotiate, could not unreasonably delay a negotiation, and must offer considered reasons why it rejected an offer).

<sup>89</sup> See, e.g., *Orloff v. Vodafone Airtouch*, *Memorandum Opinion and Order*, 17 FCC Rcd 8987 (2002) (*Orloff*); *aff’d sub. nom.*, *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003) (*Orloff Appeal*), *cert. denied*, 542 U.S. 937, 124 S.Ct. 2907, 159 L.Ed.2d 813 (2004). See also *Digital Cellular, Inc. Petition for Declaratory Ruling Regarding a Primary Jurisdiction Referral from the United States District Court for the Central District of California*, *Memorandum Opinion and Order*, 20 FCC Rcd 8723 (2005).

<sup>90</sup> See 47 C.F.R. §§ 1.721-1.736. See also Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, CC Docket No. 96-238, *Order on Reconsideration*, 13 FCC Rcd 17018 (2001).

<sup>91</sup> For example, SouthernLINC recommends “automatic placement of all roaming complaints on the Enforcement Bureau’s Accelerated Docket in order to provide for a sufficiently timely resolution of the complaint.” SouthernLINC Comments at 51. See also T-Mobile Reply Comments at 9, n.40 (suggesting that the more efficient use of the Commission’s existing enforcement mechanisms, such as the Accelerated Docket procedures, rather than an automatic roaming requirement, would be appropriate in what may be highly fact-based disputes). See also ACS Comments at 3-4 (requesting that the Commission create a 90-day dispute resolution process for customers denied roaming and carriers unable to negotiate roaming agreements.)

<sup>92</sup> SouthernLINC and T-Mobile requested that the Commission adopt certain specific proposals to amend the Accelerated Docket procedures for roaming complaints, such as: delegating authority to staff to decide roaming proceedings on the Accelerated Docket; establishing a rebuttable presumption that roaming complaints are fast tracked; imposing a mandatory 21-day settlement; imposing expedited discovery of parties roaming agreements; and deciding roaming complaints within 90 days of receipt of complaint. SouthernLINC Ex Parte Letter, dated March 7, 2007, at 3; T-Mobile Ex Parte Letter, dated May 31, 2006 at 2-4; T-Mobile Reply Comments at 9. SouthernLINC also asked the Commission to reject some of the procedural amendments that T-Mobile requested. SouthernLINC Ex Parte Letter, dated March 7, 2007, at 4-11.

subject of delegated authority decisions by the Bureau. These issues will be those that fall outside of section 5(c)(1)<sup>93</sup> of the Act, and do not raise novel issues of law or policy.”<sup>94</sup> We see no reason to adopt a different policy with regard to issues arising in a roaming complaint proceeding.

33. *Reasonableness of Automatic Roaming Requests.* In order to provide some guidance as to the reasonableness of automatic roaming requests under Sections 201(b) and 202(a), we also establish today several rebuttable presumptions with respect to requests for automatic roaming and the would-be host carriers’ response. We will presume a request for automatic roaming to be reasonable, in the first instance, if the requesting CMRS carriers’ network is technologically compatible and the roaming request is for areas outside of the requesting carrier’s home market.<sup>95</sup> As noted above, to be deemed reasonable, a request for automatic roaming may involve only those real-time, two-way switched voice or data services that are interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls.<sup>96</sup> When a presumptively reasonable automatic roaming request is made, a would-be host CMRS carrier has a duty to respond to the request and avoid actions that unduly delay or stonewall the course of negotiations regarding that request. For example, following receipt of a reasonable automatic roaming request, evidence of a would-be host carrier’s refusal to respond at all or a persistent pattern of stonewalling behavior will likely support a finding of a breach of the would-be host carrier’s automatic roaming obligations.

34. The presumptions and examples of reasonableness cited above are not exhaustive, but rather are intended to provide some guidance to parties that may be participating in a section 208 complaint proceeding involving roaming services. CMRS carriers may argue that the Commission should consider other relevant factors in determining whether there is a violation of the automatic roaming obligations, based on the totality of the circumstances present in a particular case.

35. We reiterate that our general policy regarding CMRS services is to allow competitive market forces, rather than regulations, to promote the development of wireless services. On balance, taking into consideration the concerns raised in the record by certain CMRS carriers<sup>97</sup> and our preference for allowing competitive market forces to govern rate and rate structures for wireless services, we expressly decline to impose any corresponding rate regulation of automatic roaming services as discussed more fully below. With our finding that automatic roaming is a common carrier service subject to protections in Section 201 and 202 of the Communications Act and the rebuttable presumptions we described above, we have confidence that our clarification, in conjunction with competitive market forces, will continue to foster the development of seamless automatic roaming services for all CMRS subscribers in the nation, and continue to result in a variety of just and reasonable pricing plans and service offerings.

## **2. Determination Not to Impose Rate Regulation on Roaming Agreements**

### **a. Background.**

36. In response to the *Reexamination NPRM*, some of the commenters supporting adoption of

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<sup>93</sup> 47 U.S.C. 155(c)(1).

<sup>94</sup> Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, *Second Report and Order*, 13 FCC Rcd 17018, 17070 ¶ 100 (1998) (citations omitted).

<sup>95</sup> See *infra* Section III.B.2 (in-market or home roaming discussion).

<sup>96</sup> See *infra* Section III.B.3 (non-interconnected services discussion). See also 47 U.S.C. §§ 153 and 332; 47 C.F.R. § 20.3.

<sup>97</sup> See, e.g., Cingular Comments at i, 18-30; NDNC Comments at 3; Nextel Partners Comments at 5-6.

automatic roaming obligations also request that the Commission cap the rates that a carrier may charge other carriers for automatic roaming service based on some benchmark of retail rates.<sup>98</sup> Some of these commenters have also submitted economic analyses in support of their proposals.<sup>99</sup> Other commenters oppose any rate regulation and, in turn, have submitted their own economic analyses disputing the theory and evidence used to justify the imposition of rate regulation.<sup>100</sup>

**b. Discussion.**

37. We decline to impose a price cap or any other form of rate regulation on the fees carriers pay each other when one carrier's customer roams on another carrier's network. In particular, we are not persuaded that consumers would be harmed in the absence of a price cap or some other form of rate regulation. We believe that the better course, as established in this Report and Order, is that the rates individual carriers pay for automatic roaming services be determined in the marketplace through negotiations between the carriers, subject to the statutory requirement that any rates charged be reasonable and non-discriminatory.

38. We find that there is insufficient evidence to justify regulating the roaming rates of carriers, and that any harm to consumers in the absence of affirmative regulation in this regard is speculative. . . Moreover, with the clarifications we make herein with respect to automatic roaming, we find that consumers are protected from being harmed by the level and structure of roaming rates negotiated between carriers. Absent a finding that the existing level and structure of roaming rates harm consumers, regulation of rates for automatic roaming service is not warranted. Because we are not persuaded that the existing level and structure of roaming rates negotiated between carriers harm consumers of mobile telephony services, we do not need to address the argument that the state of competition in the intermediate product market is such as to warrant rate regulation

39. Based on the foregoing considerations, we conclude that regulation of roaming rates is not warranted on economic grounds. In addition, however, we agree with concerns raised in the record that rate regulation has the potential to distort carriers' incentives and behavior with regard to pricing and investment in network buildout.<sup>101</sup> Capping roaming rates by tying them to a benchmark based on larger carriers' retail rates may diminish larger carriers' incentives to lower retail prices paid by their customers, and perhaps even give them an incentive to raise retail rates. At the same time, by requiring larger carriers to offer national roaming coverage to their competitors' customers at nearly the same rates

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<sup>98</sup> See Leap Comments at 17, 19-20 (recommending that, in geographic areas where there are three or fewer facilities-based carriers from which the carrier seeking automatic roaming service could obtain such service, the Commission prohibit a facilities-based carrier from charging rates for automatic roaming that exceed the carrier's average retail revenue per minute for that area). See also SouthernLINC Comments at 49 (proposing that the Commission establish a presumption that a carrier's roaming rates in a region are unreasonable if they exceed the lowest prevailing per-minute retail rates that it charges its own subscribers in that region).

<sup>99</sup> See, e.g., Leap Comments, Attachment A (ERS Group, *Wholesale Pricing Methods of Nationwide Carriers Providing Commercial Mobile Radio Services: An Economic Analysis*); SouthernLINC Comments, Attachment B (R. Preston McAfee, *The Economics of Wholesale Roaming in CMRS Markets*); SouthernLINC Reply Comments, Attachment B (R. Preston McAfee, *The Economics of Wholesale Roaming in CMRS Markets: Reply Comments*); Leap Reply Comments, Attachment A (David S. Sibley, *The Existence of Regional, Technology-Specific Wholesale Antitrust Markets for Roaming Services*); Leap Reply Comments, Attachment B (ERS Group, *A Further Analysis of the Wholesale Pricing Methods of Nationwide Carriers Providing Commercial Mobile Radio Service*).

<sup>100</sup> See, e.g., Rosston/Sprint Nextel Comments; Rosston/Sprint Nextel Reply Comments; Hazlett/Cingular Reply Comments; Furchtgott-Roth/T-Mobile Reply Comments.

<sup>101</sup> See, e.g., Rosston/Sprint Nextel Comments at 3, 17, 19-21, 28, 30; Hazlett/Cingular Reply Comments at 9-10, 19; T-Mobile Reply Comments at 15-17; Rosston/Sprint Nextel Reply Comments at 13-14.



offered to their own customers, this form of rate regulation may also give smaller regional carriers an incentive to reduce, or even eliminate, the discounts they offer on regional calling plans, thereby driving up the prices regional subscribers pay for calls within their plan's calling area.

40. Similarly, regulation to reduce roaming rates has the potential to deter investment in network deployment by impairing buildout incentives facing both small and large carriers. By enabling smaller regional carriers to offer their customers national roaming coverage at more favorable rates without having to build a nationwide network, rate regulation would tend to diminish smaller carriers' incentives to expand the geographic coverage of their networks. In addition, by reducing or eliminating any competitive advantage gained as a result of building out nationwide or large regional networks, rate regulation would impair larger carriers' incentives to expand, maintain, and upgrade their existing networks.<sup>102</sup>

## **B. OTHER ISSUES**

41. The following discussion addresses other issues related to automatic roaming raised by commenters in the record, including: "most favored" roaming partner rates for Tier IV CMRS carriers, in-market or home roaming issues, access to non-interconnected features and enhanced digital networks, and public filing of roaming rates.

### **1. "Most Favored" Roaming Partner Rates for Tier IV CMRS Providers**

42. *Background.* Rural Telecommunications Group (RTG) and Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)<sup>103</sup> ask the Commission to create a Tier IV category of CMRS providers that have fewer than 100,000 customers, and state that the Commission should require large, nationwide carriers to offer the same reasonable roaming arrangements to Tier IV providers as they offer to their "most favored" roaming partners.<sup>104</sup> RTG argues that this measure is necessary as a check against the abuse of power in the roaming services market by large providers.<sup>105</sup> Regional as well as national CMRS providers oppose this request. They argue that such an approach would improperly establish disparate regulatory treatment of CMRS providers by imposing an arbitrary limit on the number of customers a provider services.<sup>106</sup>

43. *Discussion.* Since our determination that automatic roaming is common carrier service

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<sup>102</sup> We note that supporters of rate regulation argue that a price cap based on a benchmark of retail rates (RPM) would not discourage nationwide carriers from building out their networks or otherwise impede their ability to provide mobile services. This is because the price cap does not deduct for the costs of customer acquisition, billing and customer care that carriers do not incur when selling automatic roaming services to other carriers and, therefore, would leave nationwide carriers with a considerably higher profit margin for providing intercarrier roaming services than they obtain from retail sales. See Leap Comments, Attachment A at 18. We concur with commenters that argue that this methodology is flawed. See Hazlett/Cingular Reply Comments at 9-10, 19-20.

<sup>103</sup> RTG asserts that it is a Section 501(c)(6) trade association dedicated to promoting wireless opportunities for rural telecommunications companies through advocacy and education in a manner that best represents the interests of its membership. OPASTCO claims that it is a national trade association representing over 550 small telecommunications carriers serving rural areas of the United States. It also states that All OPASTCO members are rural telephone companies as defined in 47 U.S.C. §153(37) and that more than half of OPASTCO members provide some form of wireless service. RTG and OPASTCO Joint Reply Comments at 1 n.1.

<sup>104</sup> See RTG and OPASTCO Joint Comments at 3-4 and 14-15.

<sup>105</sup> See Notice of *Ex Parte* Presentation by Bennet & Bennet on behalf of RTG, June 28, 2005, WT Docket No. 00-193.

<sup>106</sup> See Verizon Wireless Comments at 16-19; SouthernLINC Comments at 42; T-Mobile Reply Comments at 24; U.S. Cellular (USCC) Reply Comments at 19.

applies to all CMRS providers regardless of size, we decline to adopt RTG and OPASTCO's request to create a special Tier IV category for roaming services. We also decline to adopt a rule requiring that large nationwide carriers offer the same roaming arrangements to Tier IV providers as they offer to their "most favored" roaming partners.

44. Because the need for automatic roaming services may not always be the same, and the value of roaming services may vary across different geographic markets due to differences in population and other factors affecting the supply and demand for roaming services, it is likely that automatic roaming rates will reasonably vary.<sup>107</sup> As discussed earlier, mobile services in the United States are differentiated based on price, as well as non-price attributes, including geographic coverage. Competition between mobile telephone pricing plans that are differentiated in these ways benefits consumers by allowing them to choose pricing plans that offer the best deal on the types of services they use most frequently.<sup>108</sup> Mandating that a subcategory of CMRS carriers (*i.e.*, Tier IV providers) are entitled to the same rates as "most favored" roaming partners and imposing this obligation on certain large CMRS carriers, without a clear demonstration of why such a requirement would serve the public interest, would distort competitive market conditions, resulting in unjust and unreasonable practices and discriminatory treatments.

45. Accordingly, we decline to mandate that a subcategory of CMRS carriers (*i.e.*, Tier IV providers) be entitled to the same rates as "most favored" roaming partners. We similarly decline to impose such an obligation on only certain larger CMRS carriers. Instead, we believe that our finding that automatic roaming rule is a common carrier service subject to provisions of Sections 201, 202 and 208 of the Communications Act and guidance as to rebuttable presumptions establishing the reasonableness of an automatic roaming request provide small CMRS carriers with an effective mechanism for recourse against unjust and unreasonable practices.

## 2. In-Market or Home Roaming

46. *Background:* In the *Reexamination NPRM*, the Commission sought comment on whether a carrier should be required to enter into an automatic roaming arrangement on a nondiscriminatory basis with a facilities-based competitor in the same market.<sup>109</sup> The Commission asked if such a requirement would diminish carriers' incentives for building out their networks and how an exception to an automatic roaming obligation that permits carriers to deny roaming agreements to in-market competitors could be administered, given the different geographic scope of wireless licenses.<sup>110</sup>

47. Verizon Wireless argues that a home roaming requirement would remove incentives for carriers to build out their own networks and would eliminate network quality, reliability and coverage as facets of wireless competition.<sup>111</sup> MetroPCS and SouthernLINC assert, however, that it defies logic that carriers would use in-market roaming in lieu of building out because such behavior would either reduce profits or increase consumer prices.<sup>112</sup> Leap Wireless states that carriers should not be permitted to invoke in-market justifications to refuse automatic roaming agreements, especially in areas where regional carriers have no facilities.<sup>113</sup> AIRPEAK and Airtel indicate that the technical complexities of in-

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<sup>107</sup> See Sprint Comments, Rosston Declaration at 26-28.

<sup>108</sup> See roaming rate regulation discussion *supra* at Section III.A.

<sup>109</sup> See *Reexamination NPRM*, 20 FCC Rcd at 15060 ¶ 35.

<sup>110</sup> See *id.*

<sup>111</sup> See Verizon Wireless Comments at 17-18; Verizon Wireless Reply Comments at 20.

<sup>112</sup> See MetroPCS Comments at 29; SouthernLINC Reply Comments at 41.

<sup>113</sup> See Leap Wireless Comments at 15-16.

market roaming are challenging and, as a result, they do not seek such a requirement.<sup>114</sup>

48. *Discussion:* We determine that our automatic roaming obligation does not include an in-market or home roaming requirement. We are not requiring a CMRS carrier to provide automatic roaming to a requesting CMRS carrier in a market where the CMRS carrier directly competes with the requesting CMRS carrier. Specifically, a CMRS carrier is not required to provide automatic roaming to a requesting CMRS carrier where the requesting CMRS carrier holds a wireless license or spectrum usage rights (e.g., spectrum leases) in the same geographic location as the would-be host CMRS carrier. In geographic areas outside of these overlapping areas or markets, however, a host carrier must comply with our automatic roaming requirement and provide this service in a manner consistent with the common carrier obligations of Sections 201 and 202 of the Communications Act.<sup>115</sup>

49. Contrary to certain carriers' contentions,<sup>116</sup> we find that an automatic roaming request in the home area of a requesting CMRS carrier, the area where the requesting CMRS carrier has the spectrum to compete directly with the would-be host carrier, does not serve our public interest goals of encouraging facilities-based service and supporting consumer expectations of seamless coverage when traveling outside the home area. We agree with Cingular that, if a carrier is allowed to "piggy-back" on the network coverage of a competing carrier in the same market, then both carriers lose the incentive to build-out into high cost areas in order to achieve superior network coverage.<sup>117</sup> If there is no competitive advantage associated with building out its network and expanding coverage into certain high cost areas, a carrier will not likely do so. Consequently, consumers may be disadvantaged by a lack of product differentiation, lower network quality, reliability and coverage. In other words, we believe that requiring home roaming could harm facilities-based competition and negatively affect build-out in these markets, thus, adversely impacting network quality, reliability and coverage. This conclusion, however, should not be construed as prohibiting a requesting carrier from seeking to negotiate a roaming agreement including such terms if desired, or a host carrier from providing a requesting CMRS carrier with in-market or home roaming should it chose to do so. We continue to encourage all CMRS carriers to negotiate desired terms and conditions of automatic roaming agreements, including automatic roaming in overlapping geographic markets.

50. For purposes of this exclusion from automatic roaming obligations, in-market or home roaming is defined as any geographic location where the would-be host carrier and the requesting CMRS carrier have wireless licenses or spectrum usage rights that could be used to provide CMRS that cover or overlap the same geographic location(s).<sup>118</sup> Within these overlapping geographic areas, the would-be host carrier is not required to comply with an automatic roaming request.<sup>119</sup> This in-market or home roaming

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<sup>114</sup> See AIRPEAK/Airtel Joint Comments at 9.

<sup>115</sup> 47 U.S.C. §§ 201, 202.

<sup>116</sup> See Leap Wireless Comments at 15; MetroPCS Comments at 29-30; SouthernLINC Reply Comments at 28, 41.

<sup>117</sup> See Cingular Comments at 26. See also Verizon Wireless Comments at 17-18.

<sup>118</sup> The overlapping geographic areas are excluded if the licenses and/or spectrum usage rights are, for example, in the cellular, covered SMR, PCS, 700 MHz or AWS bands.

<sup>119</sup> For example, if the requesting carrier has a wireless license that is based on a Metropolitan Statistical Area (MSA) and the would-be host carrier has a wireless license that is based on an Economic Area (EA) and the geographic location of the requesting carrier's MSA is within the host carrier's EA, then the would-be host carrier is not required by our automatic roaming requirement to provide such service within the geographic location of the requesting carrier's MSA. With regard to the areas outside of the requesting carrier's MSA that fall within the host carrier's EA, however, the host carrier must provide automatic roaming in a manner that is consistent with the common carrier provisions of Sections 201 and 202 of the Communications Act.

exclusion does not depend on the level of service the requesting CMRS carrier is providing in the overlapping geographic area. The exclusion applies regardless of whether the requesting CMRS carrier is providing no service, limited service, or state-of-the-art service.

51. Finally, we also determine that the automatic roaming obligation under Sections 201 and 202 and the home roaming exclusion are not intended to resurrect CMRS resale obligations.<sup>120</sup> CMRS resale entails a reseller's purchase of CMRS service provided by a facilities-based CMRS carrier in order to provide resold service within the same geographic market as the facilities-based CMRS provider.<sup>121</sup> We note that the Commission's mandatory resale rule was sunset in 2002,<sup>122</sup> and automatic roaming obligations can not be used as a backdoor way to create *de facto* mandatory resale obligations or virtual reseller networks.<sup>123</sup>

### 3. Access to Certain Data Features and Enhanced Digital Networks

#### a. Access to push-to-talk, text messaging (SMS) and non-interconnected data features

52. *Background.* In the *Reexamination NPRM*, the Commission sought comment on access to push-to-talk, dispatch, or other data roaming.<sup>124</sup> The Commission asked whether an automatic roaming rule should require carriers to permit roaming access to all technical features of their systems, and/or require carriers to make the same features accessible to all of their roaming partners.<sup>125</sup> The Commission stated that this issue initially was raised by SouthernLINC in the proceeding addressing the Sprint-Nextel merger, and invited comments on this issue, including information on how common practices (such as those alleged by SouthernLINC) are within the industry.<sup>126</sup>

53. In response to the *Reexamination NPRM*, SouthernLINC, AIRPEAK, and Airtel argue that data services should be included as part of an automatic roaming obligation because demand for data services is growing and its inclusion advances "ubiquitous access to mobile services."<sup>127</sup> SouthernLINC adds that there is a "market failure" because Sprint Nextel, the only nationwide iDEN-based service provider, will not provide data roaming access to SouthernLINC customers, but does provide such roaming services for customers of foreign iDEN carriers.<sup>128</sup> SouthernLINC contends that push-to-talk is highly valued by subscribers because it enables subscribers to establish private conferences on a one-to-

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<sup>120</sup> Resale has been described by the Commission as "an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications services and facilities to the public (with or without adding value) for profit." Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Docket No. 20097, *Report & Order*, 60 FCC 2d 261, 271 ¶ 17 (1976), *aff'd on recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom.*, *AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978).

<sup>121</sup> See Cingular Comments at 8.

<sup>122</sup> The CMRS Resale Rule expired at the close of November 24, 2002 pursuant to the sunset provision of the rule. 47 C.F.R. § 20.12(b) (1998).

<sup>123</sup> See 47 C.F.R. § 20.12; Sprint Nextel Comments at 19.

<sup>124</sup> See *Reexamination NPRM*, 20 FCC Rcd at 15060-61.

<sup>125</sup> See *id.* at 15060-61.

<sup>126</sup> See *id.*

<sup>127</sup> See SouthernLINC Comments at 13, 18, 48-49; SouthernLINC Reply Comments at 7, 41; AIRPEAK/Airtel Joint Comments at 7.

<sup>128</sup> See SouthernLINC Comments at 12-15.

one or one-to-many basis using a single handset that can be used for phone, paging, and wireless data services.<sup>129</sup> Sprint Nextel and Nextel Partners oppose adoption of an automatic roaming rule and maintain that they should not be obliged to assist a competitor.<sup>130</sup> They claim that to do so would be to relinquish competitive advantages that they have earned through legitimate business decisions and capital investment to differentiate their service.<sup>131</sup> Further, Sprint Nextel argues that push-to-talk roaming necessitates costly changes to the network and would be difficult to implement and maintain.<sup>132</sup>

54. *Discussion.* As discussed above, the scope of automatic roaming services includes only services offered by CMRS carriers that are real-time, two-way switched voice or data services that are interconnected with the public switched network and utilize an in-network switching facility that enables providers to reuse frequencies and accomplish seamless hand-offs of subscriber calls. As discussed below, we find that it would serve the public interest to extend automatic roaming obligations to push-to-talk<sup>133</sup> and SMS. We decline at this time, however, to adopt a rule extending the automatic roaming obligation beyond that to offerings that do not fall within the scope of the automatic roaming services' definition, such as non-interconnected services or features.<sup>134</sup>

55. With respect to push-to-talk and SMS, we note that such offerings are typically bundled as a feature on the handset with other CMRS services, such as real-time, two-way switched mobile voice or data, that are interconnected with the public switched network.<sup>135</sup> Provision of these features differs from one carrier to another, *i.e.*, push-to-talk and SMS are interconnected features or services in some instances, but non-interconnected in others, depending on the technology and network configuration chosen by the carriers. We are also aware that consumers consider push-to-talk and SMS 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. For these reasons, we find that it is in the public interest to impose an automatic roaming obligation on push-to-talk and SMS offerings, subject to several provisos. Namely, the requesting carrier must offer push-to-talk and SMS to its subscribers on its own home network;<sup>136</sup> push-to-talk and SMS roaming must be technically feasible; and any changes to the would-be host carrier's network that are necessary to accommodate push-to-talk and SMS roaming requests must be economically reasonable.

56. With respect to non-interconnected features or services,<sup>137</sup> we find that the record in this proceeding lacks a clear showing that it is in the public interest at this time to impose an automatic roaming obligation. While proponents of unrestricted data roaming have argued that requiring roaming access to the non-interconnected features of a competitor's network would benefit consumers by providing greater availability for data features that are increasingly used by consumers, opponents are

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<sup>129</sup> See SouthernLINC Comments, Attachment A at 7.

<sup>130</sup> See Sprint Nextel Comments at 2-4 and 17-21; Nextel Partners Reply Comments at 1-3.

<sup>131</sup> See Sprint Nextel Comments at 17-21; Nextel Partners Reply Comments at 3.

<sup>132</sup> See Sprint Nextel Reply Comments at 16-17.

<sup>133</sup> We note that some cellular and broadband PCS carriers offer push-to-talk functionality via the public switched network. See *e.g.*, *Eleventh Report*, at 10973; *Sprint Nextel Order*, 20 FCC Rcd at 13987-13989 ¶¶ 46-50.

<sup>134</sup> We note that nothing in this order should be construed as addressing regulatory classifications of push-to-talk, SMS or other data features/services.

<sup>135</sup> See, *e.g.*, *Sprint Nextel Order*, 20 FCC Rcd at 13987 ¶ 46. See also SouthernLINC Comments at 52.

<sup>136</sup> See, *e.g.*, SouthernLINC Reply Comments at 30.

<sup>137</sup> See *infra* Section III.B.4.b.

concerned that it might undercut incentives to differentiate products and could chill innovation.<sup>138</sup> These opponents claim that extending roaming to non-interconnected features of a competitors' network may also adversely affect business decisions to build out facilities for facilities-based competition and reduce the incentives to access the spectrum through other means such as initial spectrum licensing or secondary markets. In light of these diverse views, we believe it is in the public interest, however, to examine the issue of automatic roaming for non-interconnected features or services through a Further Notice of Proposed Rulemaking, which is included in this item.<sup>139</sup>

**b. Access to Enhanced Digital Networks**

57. *Background.* In the *Reexamination NPRM*, the Commission stated that until recently, carriers' networks consisted primarily of second generation or "2G" digital technology, which provided voice and limited data service.<sup>140</sup> The Commission asked, if the Commission were to apply some form of automatic roaming requirement to 2G systems, whether that requirement should also apply to upgraded enhanced digital networks, such as 2.5G or 3G systems.<sup>141</sup> Recognizing that a competitive marketplace ordinarily encourages providers to invest capital to upgrade their networks, bringing the most modern services to their customers, the Commission asked, *inter alia*, what impact an automatic roaming requirement would have on the incentive of CMRS providers to invest in such upgrades.<sup>142</sup>

58. Most parties who participated in the roaming proceeding do not directly address automatic roaming on upgraded enhanced digital networks. Of those commenters who addressed data roaming services, the majority oppose extending automatic roaming to data services using enhanced digital networks.<sup>143</sup>

59. A few CMRS providers, however, requested that the Commission require automatic roaming for all services, including non-interconnected data services provided over enhanced digital networks.<sup>144</sup> ACS and MetroPCS contend that an automatic roaming requirement should apply to all enhanced data services, including services using EV-DO technology.<sup>145</sup> Of these two entities, however, only ACS asserts that it has deployed an EV-DO network capable of delivering mobile wireless broadband Internet

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<sup>138</sup> Verizon Wireless Comments at 22; Verizon Wireless Reply Comments at 24-25.

<sup>139</sup> See e.g., Verizon Wireless Comments at 22; Verizon Wireless Reply Comments at 24-25; EDGE Reply Comments at 8-9; NDNC Comments at 3.

<sup>140</sup> See *Reexamination NPRM*, 20 FCC Rcd at 15063 ¶ 44.

<sup>141</sup> The Commission stated that, in addition to providing more voice calling capacity, such enhanced digital networks "enable carriers to provide various services, such as text messaging, Internet downloads, video transmissions, and e-mail communications. GSM carriers are upgrading their networks to include General Packet Radio Services (GPRS) and Enhanced Data Rates for GSM Evolution (EDGE) technologies, and CDMA carriers are upgrading their networks to include CDMA2000 1xRTT technology. In the future, GSM carriers will employ Wideband CDMA, and CDMA carriers will employ Evolution Data Only (EV-DO) and Evolution-Data and Voice (EV-DV) systems to provide even greater enhancements to their networks." See *Reexamination NPRM*, 20 FCC Rcd at 15063 n.95.

<sup>142</sup> See *Reexamination NPRM*, 20 FCC Rcd at 15063 ¶ 45.

<sup>143</sup> See ALLTEL Reply Comments at 8; Cingular Reply Comments at 3 & n.8; EDGE Reply Comments at 8-9; Nextel Partners Comments at 12; Sprint Reply Comments at 19-20; T-Mobile Comments at 16; T-Mobile Reply Comments at 14; Verizon Wireless Comments at 22; Verizon Wireless Reply Comments at 24-25.

<sup>144</sup> See ACS Comments at 6; MetroPCS Comments at 25 n.58.

<sup>145</sup> See *id.*

access services.<sup>146</sup> ACS contends that it has not been able to enter into an automatic roaming agreement with national providers who have also developed EV-DO networks.<sup>147</sup> According to ACS, this is due to a lack of market driven incentives sufficient to encourage comprehensive provision of wireless enhanced data services.<sup>148</sup> EDGE, a small provider with fewer than 150,000 subscribers, requests that the Commission continue to abstain from imposing automatic roaming rules for enhanced data services using EDGE and GPRS technologies.<sup>149</sup> EDGE argues that forced roaming would thwart market forces by benefiting only those providers that have opted to invest less on their systems.<sup>150</sup>

60. *Discussion.* As we explained earlier in this Report and Order, the automatic roaming obligation applies to real-time, two-way switched voice or data services that are interconnected with the public switched network and utilize an in-network switching facility that enables providers to reuse frequencies and accomplish seamless hand-offs of subscriber calls.<sup>151</sup> As discussed above with respect to non-interconnected services, we similarly decline at this time to extend the scope of the automatic roaming services definition to include non-interconnected services provided over enhanced digital networks, such as wireless broadband Internet access. We find that automatic roaming, as a common carrier obligation, does not extend to services that are classified as information services or to other wireless services that are not CMRS.<sup>152</sup> While we find that, based on the current record, it is premature to impose any roaming obligation regarding enhanced data services that are not CMRS and not interconnected to the public switched network, we will examine this matter further in the Further Notice of Proposed Rulemaking included in this item.

#### 4. Public Filing of Roaming Rates

61. *Background.* In its comments, MetroPCS requests that the Commission require the public filing of roaming agreements. It notes that current remedies are inadequate due to the lack of any publicly-available information concerning the terms and conditions under which national CMRS carriers offer roaming to each other, their respective affiliates, or unaffiliated carriers.<sup>153</sup>

62. *Discussion.* We decline to impose an affirmative obligation on CMRS carriers to post their roaming rates. As is generally the case with commercial agreements, roaming agreements are confidential and filing them would impose administrative costs on the carriers.<sup>154</sup> In light of our adoption of an automatic roaming rule as discussed below, we find that the available remedies for redress are

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<sup>146</sup> See ACS Comments at 4.

<sup>147</sup> See *id.*

<sup>148</sup> See *id.*

<sup>149</sup> See EDGE Reply Comments at 1, 8.

<sup>150</sup> See *id.* at 9; see also, NDNC Comments at 3 (arguing against automating roaming rules because they create a disincentive for companies to further develop their networks).

<sup>151</sup> See *supra* ¶ 1.

<sup>152</sup> See *Wireless Broadband Internet Access Declaratory Ruling*, 22 FCC Rcd at 5906 ¶¶ 11-12.

<sup>153</sup> See Metro PCS Comments at 26-27; Cleveland Unlimited Reply Comments at 8 (agreeing with Metro PCS that roaming agreements should be made public). See also Metro PCS *Ex Parte* dated February 7, 2006 wherein it requested that the Commission compel all carriers large and small to provide complete information regarding their existing roaming arrangements and roaming policies. However, SouthernLINC argued that the Commission should not require the posting of all the roaming agreements, indicating that the Commission and other parties should rely on the “publicly available information.” SouthernLINC Reply Comments at 18.

<sup>154</sup> See Implementation of Section 3(n) and 332 of the Communications Act, *Second Report and Order*, 9 FCC Rcd 1411, 1478-1480 ¶¶ 175-179 (1994) (*CMRS Second Report and Order*).

sufficient to address disputes that may arise. Therefore, we need not burden CMRS carriers by requiring them to file roaming agreements. Furthermore, disclosure of roaming agreements would enable CMRS carriers to ascertain competitors' prices which could encourage carriers to maintain artificially high rates.<sup>155</sup> In a market where competition disciplines the rates, creating transparency in rates may have the effect of restricting competition and raising rates above competitive levels.<sup>156</sup> Therefore, we do not find that the public interest would be served by requiring CMRS carriers to disclose their agreements or to undertake the costs required to make them public.

### C. CODIFICATION OF AUTOMATIC ROAMING OBLIGATIONS

63. In this Report and Order, we codify the CMRS carriers' automatic roaming obligation into a rule requiring that CMRS carriers provide automatic roaming to any requesting technologically compatible CMRS carrier outside of the requesting carrier's home market on reasonable and nondiscriminatory terms and conditions. Based on the record before us, we determine that, similar to the manual roaming rule, it would serve the public interest to codify an automatic roaming rule imposing an affirmative obligation to provide automatic roaming on CMRS carriers that offer real-time, two-way switched voice or data service over digital network that is interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls. This ruling is based on our recognition that automatic roaming benefits mobile telephony subscribers by promoting seamless CMRS service around the country and reducing inconsistent coverage and service qualities.<sup>157</sup>

64. Codification of this requirement is also particularly relevant for rural areas.<sup>158</sup> Many smaller and regional CMRS carriers urge the Commission to adopt an automatic roaming rule, confirming that CMRS carriers have an affirmative obligation to provide automatic roaming service to other CMRS carriers on a just, reasonable, and non-discriminatory basis.<sup>159</sup>

65. The record reflects a number of ongoing complaints by small, regional and rural CMRS carriers against the nationwide CMRS carriers. These small and rural carriers assert that under current market conditions, it is getting more difficult for them to obtain access to nationwide carriers' networks through automatic roaming agreements. For example, RTG reports that "small rural carriers have experienced a spike in the cost for their customers to roam on the nationwide carriers' network and an increased unwillingness by the nationwide carriers to enter into roaming agreements or renew existing

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<sup>155</sup> See *CMRS Second Report and Order*, 9 FCC Rcd 1478-1480 ¶¶ 175-179 (declining to impose tariffs on CMRS carriers, in part, because it would allow carriers to maintain artificially high rates); see also, Department of Justice/Federal Trade Commission Merger Guidelines § 2.1 (the amount of information available to companies could be relevant to the companies' abilities to engage in anticompetitive behavior).

<sup>156</sup> See *id.*

<sup>157</sup> See ACS Comments at 1-2; SLO Cellular Reply Comments at 5; Navajo Nation Comments at 5 in WT Docket No. 06-156.

<sup>158</sup> See 47 U.S.C. §§ 301, 303(c), 332.

<sup>159</sup> See generally Leap Comments; SLO Cellular Comments; MetroPCS Comments; SouthernLINC Comments; Safety and Frequency Equity Competition Coalition (SAFE) Comments; NY3G Partnership (NY3G) Comments; Comments of Organization for the Promotion Advancement of Small Telecommunications Companies (RTG/OPASTCO), Alaska Native Broadband 1 License, LLC (ANB), Centennial, John Staurulakis, Inc. (JSI), Unicom, National Telecommunications Cooperative Association (NTCA), ACS Wireless, Inc. (ACS), AIRPEAK Communications, LLC and Airtel Wireless, LLC, Joint Comments (AIRPEAK/Airtel Joint Comments), North Dakota Network Company (NDNC), NTCA, RCA, Cleveland Unlimited, Inc. (Cleveland Unlimited), Punxsutawney Communications (Punxsutawney), Suncom Wireless (Suncom).



ones.”<sup>160</sup> Both Airpeak and SouthernLINC also describe the difficulties they have had obtaining roaming agreements from Sprint/Nextel and Nextel Partners.<sup>161</sup>

66. We codify the automatic roaming obligations of CMRS carriers into a rule requiring that they provide automatic roaming to any requesting technologically compatible CMRS carrier outside of the requesting CMRS carrier’s home market on reasonable and nondiscriminatory terms and conditions.<sup>162</sup> This rule applies to CMRS carriers that offer real-time, two-way switched voice or data service over digital network that is interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls. We also note that codification of an automatic roaming obligation gives CMRS carriers another avenue to redress roaming disputes, benefiting mobile telephony subscribers.

67. Finally, we clarify that automatic roaming, pursuant to Sections 201 and 202, as a common carrier obligation applies to CMRS carriers’ analog networks. We do not find, however, that it is necessary to codify this obligation into a specific rule. With the sunset of the analog service requirement on February 18, 2008, there would be little benefit to a codified automatic roaming rule for analog networks that might potentially apply between now and that date.<sup>163</sup> Individual carriers may, of course, enter into automatic roaming agreements for their analog networks, and any allegations that particular practices on analog networks are unjust, unreasonable or otherwise in violation of Sections 201 and 202 of the Communications Act would be subject to the complaint process of Section 208 of the Communications Act.

#### **D. PETITION FOR INVESTIGATION PURSUANT TO SECTION 403 OF THE ACT**

68. On April 25, 2006, pursuant to Section 403 of the Act,<sup>164</sup> AIRPEAK, Airtel, Cleveland Unlimited, Leap Wireless, MetroPCS, Punxsutawney, RTG, and SouthernLINC filed a joint petition that asks the Commission to initiate an inquiry for the purpose of gathering and inspecting a representative sample of wireless carrier roaming agreements on a confidential basis.<sup>165</sup> On May 5, 2006, Oppositions to

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<sup>160</sup> RTG Comments at 10; Leap Reply Comments at 7.

<sup>161</sup> See Airpeak Comments at 6-8; SouthernLINC Comments at 11-15.

<sup>162</sup> See ACS Comments at 1-2; SLO Cellular Reply Comments at 5; Navajo Nation Comments at 5 in WT Docket No. 06-156.

<sup>163</sup> In 2002, the Commission found that it was in the public interest to no longer require carriers to continue to provide analog service after February 18, 2008. See Year 2000 Biennial Regulatory Review—Amendment of Part 22 of the Commission’s Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services, *Report and Order*, WT Docket No. 01-108, 18 FCC Rcd 490 ¶ 22 (2002) (“2000 Biennial Review R & O”). See also 47 C.F.R. § 22.901(b) and Sunset of the Cellular Radiotelephone Service Analog Service Requirement and Related Matters, RM No. 11355, *Memorandum Opinion and Order*, FCC 07-103 (rel. June 15, 2007) (denying an alarm industry petition seeking a two-year extension of the February 18, 2008 sunset of the cellular licensee analog service requirement).

<sup>164</sup> Section 403 of the Communications Act provides, in pertinent part, that “[t]he Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing . . . under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act.” See 47 U.S.C. § 403. Consistent with this statutory language, the Commission has held that it has broad discretion whether to institute a Section 403 inquiry. See In the Matter of James A. Kay, Jr., *Memorandum Opinion & Order*, 13 FCC Rcd 16369, 16373 ¶ 10 (1998).

<sup>165</sup> See Joint Petition.

the Joint Petition were filed by Cingular, Sprint/Nextel and Verizon Wireless.<sup>166</sup> On May 12, 2006, the Petitioners filed a Reply to Oppositions.<sup>167</sup> In light of our adoption of an automatic roaming rule today and related clarifications, we deny the Joint Petition.

69. *Background.* The parties who filed the Joint Petition request that the Commission impose an automatic roaming requirement.<sup>168</sup> Petitioners argue that there is a sharp disagreement between the large national providers and smaller local and regional providers as to whether roaming services are being made available on reasonable non-discriminatory terms.<sup>169</sup> Petitioners reason that the “best evidence” to resolve this dispute is to review a representative sample of the actual roaming agreements.<sup>170</sup> To that end, they request that the Commission require that carriers file these agreements with the Commission for review and inspection.

70. Cingular, Sprint/Nextel and Verizon Wireless oppose the Joint Petition. They make the following arguments: the record in the proceeding is sufficient for the Commission to decide whether an automatic roaming rule is necessary;<sup>171</sup> without a comprehensive review of the facts of the circumstances leading to the terms of the roaming agreements, a review of the roaming agreements alone does not conclusively establish whether the terms were reasonable;<sup>172</sup> and a requirement to file the agreements would impose a substantial burden on providers and jeopardize confidential market sensitive information.<sup>173</sup>

71. *Discussion.* Because we find that the record is sufficient to codify automatic roaming obligations of CMRS carriers, we deny the Joint Petition. Petitioners contend that a Section 403 inquiry will assist the Commission in gathering necessary information to support the adoption of an automatic roaming rule and further supplement the record in this proceeding.<sup>174</sup> In light of our codification of automatic roaming obligations today and related findings, parties who wish to challenge the proposed terms of a roaming agreement as unreasonably discriminatory or unjust can file complaints before the Commission on a case-by-case basis.<sup>175</sup> The Commission has broad discretion to obtain any relevant information to resolve such complaints at that time, if needed.<sup>176</sup> Therefore, we deny the Joint Petition.

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<sup>166</sup> See Cingular Opposition to Joint Petition for Commission Inquiry, WT Docket No. 05-265, filed May 5, 2006; Sprint Nextel Opposition to Joint Petition for Section 403 Investigation, WT Docket No. 05-265, filed May 5, 2006; Verizon Wireless Opposition to Joint Petition for Commission Inquiry, WT Docket No. 05-265, filed May 5, 2006.

<sup>167</sup> See Reply to Oppositions, WT Docket No. 05-265, filed May 12, 2006.

<sup>168</sup> See Joint Petition at 5.

<sup>169</sup> See *id.*

<sup>170</sup> See *id.*

<sup>171</sup> See Cingular Opposition at 3; Sprint Opposition at 1; Verizon Wireless Opposition at 2.

<sup>172</sup> See Cingular Opposition at 4; Sprint Opposition at 4; Verizon Wireless Opposition at 6.

<sup>173</sup> See Sprint Opposition at 5; Verizon Wireless Opposition at 8.

<sup>174</sup> See Joint Petition at 1, 5.

<sup>175</sup> See *supra* ¶¶ 24-26.

<sup>176</sup> See *Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 789 (D.C. Cir. 2000) (the Commission has broad discretion whether to grant discovery requests in section 208 proceedings); In the Matter of SBC Communications, Inc., *Apparent Liability for Forfeiture*, 17 FCC Rcd 7589, 7594 ¶ 11 (2002); Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Providers, *Report and Order*, 12 F.C.C.R. 22497, 22615 ¶ 291 n.782 (1997) (continued....)

## E. MANUAL ROAMING

72. *Background.* The *Reexamination NPRM* sought current information about the continued utility of the manual roaming rule.<sup>177</sup> The *Reexamination NPRM* explained that the Commission was aware of at least two ways to conduct manual roaming. In its simplest form, a host system uses information from the roaming mobile unit during a call setup to determine whether the unit is a subscriber in the market and, if not, routes the call to a third party for operator assistance, payment arrangements, and completion of the call. In a more complex form, the host system uses the information to identify the unit's home carrier and determine whether that carrier has a roaming agreement in place with the host carrier. If no agreement exists, the host carrier routes the call to a third party to complete the steps needed for call completion as described above. In either case, roaming can occur only if the unit is technologically compatible with the host system.<sup>178</sup> The *Reexamination NPRM* sought comment on how often subscribers avail themselves of manual roaming in either of its two forms or other forms, if available. In light of both the evolution of the CMRS market and advancements in CMRS technologies, the *Reexamination NPRM* asked to what extent manual roaming had fallen into disuse or been replaced by automatic roaming and asked whether any manual roaming requirement that we retain in this proceeding should be subject to a sunset provision and, if so, when such a sunset should occur.<sup>179</sup> The *Reexamination NPRM* also sought comment on whether "the manual roaming rule should be kept to as a fallback for consumers when automatic roaming is unavailable."<sup>180</sup>

73. The Commission received comments with diverging views on this issue. Many commenters oppose retention of the manual roaming rule for differing reasons.<sup>181</sup> Some carriers who oppose adoption of an automatic roaming rule also oppose retention of manual roaming. They contend that the availability of roaming services is so widespread there is no need for a roaming requirement of any kind.<sup>182</sup> There are other commenters, however, who support adoption of an automatic roaming rule but oppose retention of the manual roaming rule, contending that manual roaming is insufficient to satisfy the needs of the consumers who expect seamless wireless service wherever they may go.<sup>183</sup> Other commenters argue that there is still a need for the manual roaming requirement for those situations in which a carrier cannot provide its subscribers with automatic roaming services in a certain geographic area, either because it has been unable to reach an agreement with the host carrier or because of technical issues with its own network.<sup>184</sup> Verisign, a provider of manual "roaming solutions," requests retention of the manual roaming

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(In any section 208 complaint proceeding, Commission staff may exercise its discretion to require a defendant carrier to present relevant information).

<sup>177</sup> See *Reexamination NPRM*, 20 FCC Rcd at 15056 ¶ 22.

<sup>178</sup> See *id.*

<sup>179</sup> *Reexamination NPRM*, 20 FCC Rcd at 15056 ¶¶ 23-24.

<sup>180</sup> *Reexamination NPRM*, 20 FCC Rcd at 15056 ¶ 23.

<sup>181</sup> See, e.g., Verizon Wireless Comments at 2; Cingular Comments at 16; T-Mobile Comments at 12.

<sup>182</sup> Verizon Wireless Comments at 2; Cingular Comments at 16; T-Mobile Comments at 12. Sprint claims that automatic roaming has become so prevalent that it does not address manual roaming issues. Sprint Comments at 2 n.4; Sprint Reply Comments at 1 n.1.

<sup>183</sup> Leap Wireless Comments at 5; RTG and OPASTCO Joint Reply Comments at 9; SouthernLINC Comments at 32; USCC Comments at 7-10.

<sup>184</sup> See MetroPCS Comments at 3 (asserting the difficulty that MetroPCS has had in entering into automatic roaming agreements); *id.* at 20 (explaining that manual roaming is still necessary when an automatic roaming services agreement is not unavailable); Unicom Reply Comments at 2 (stating that Unicom is still in the process of (continued....))

rule based on continuing need.<sup>185</sup>

74. *Discussion.* We decline to sunset our existing manual roaming rule and, instead, retain it as a safety net for consumers.<sup>186</sup> We are aware that as automatic roaming becomes increasingly ubiquitous, it will render the need for manual roaming obsolete. We note, however, that the record demonstrates that automatic roaming is not available in certain instances today and, therefore, the continuing utility of our manual roaming rule in the immediate future is not completely obviated. For this reason, we will not sunset our manual roaming rule at this time.

75. Commenters, including those both for and against the adoption of an automatic roaming rule, have indicated that there could be geographic areas where carriers are not providing their customers with automatic roaming services because they have not yet entered into an automatic roaming services agreement with a host carrier that provides service in that area.<sup>187</sup> Further, the record establishes that consumers still seek manual roaming services. Verisign, for example, asserts that at least 18,000 manual roaming calls are completed each month and that consumers attempt to make 800,000 manual roaming calls per month.<sup>188</sup> Some carriers, such as Unicom, still rely on manual roaming for analog service and ask that manual roaming be continued until it has completed the process of replacing its old analog equipment.<sup>189</sup> MetroPCS argues that retention of the manual roaming rule is necessary to provide a safety net in circumstances where an automatic roaming agreement is not in place.<sup>190</sup>

76. Therefore, we retain the manual roaming rule as a safety net to ensure that subscribers can initiate a wireless call when they are outside of their service area through manual roaming if there is no automatic roaming agreement in place. As we have previously stated, consumers have come to expect seamless wireless service wherever they travel within the United States and, ultimately, this will be achieved through automatic roaming.<sup>191</sup> We find that our codification of automatic roaming obligations, in conjunction with our determination that automatic roaming is a common carrier service, serves the public interest by enabling subscribers to seamlessly roam and, over time, the provision of automatic roaming will diminish the need for manual roaming.

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transitioning its network from analog, which does not permit automatic roaming, to digital services), 9; Verisign Comments at 2-3 (asserting that consumers still make manual roaming calls).

<sup>185</sup> Verisign Comments at 2-3.

<sup>186</sup> We note that the scope of our existing manual roaming rule is limited to certain CMRS providers. However, as the Commission previously stated, “[a]llegations that particular practices by non-covered CMRS providers [*i.e.*, those not covered by the extended manual roaming rule] are unjust, unreasonable or otherwise in violation of the Communications Act would be grounds for complaint under Section 208 of that Act.” *Interconnection and Resale Obligations Second Report and Order*, 11 FCC Rcd at 9471 ¶ 14.

<sup>187</sup> See Metro PCS Comments at 20 (stating that manual roaming should remain in place as a “safety net” for customers whose CMRS providers have not obtained an automatic roaming services agreement). NTCH Comments at 3-4 (explaining that it NTCH was not able to enter into a roaming agreement with another CDMA carrier until the Commission initiated the *Reexamination NPRM*); USCC Reply Comments at 9-10 (describing difficulties USCC has in entering into roaming agreements with Cingular, Sprint, and Nextel Partners); Sprint Comments at 17-18 (arguing that Sprint has no duty to enter into an agreement with a competitor). Cingular Reply Comments at 18 (arguing that Cingular cannot enter into roaming agreements with some carriers who have failed to upgrade their networks).

<sup>188</sup> Verisign Comments at 2.

<sup>189</sup> See Unicom Reply Comments at 2.

<sup>190</sup> See MetroPCS Comments at 20.

<sup>191</sup> See *supra* ¶ 27.

#### IV. FURTHER NOTICE OF PROPOSED RULEMAKING

77. In the Report and Order, we extend the automatic roaming requirement only to services offered by CMRS carriers that are real-time, two-way switched voice or data services that are interconnected with the public switched network, and to push-to-talk and text messaging.<sup>192</sup> In this Further Notice of Proposed Rulemaking, we seek comment on whether we should extend the automatic roaming obligation to non-interconnected services or features, including services that have been classified as information services, such as wireless broadband Internet access service, or other non-CMRS services offered by CMRS carriers. Further, we seek comment on the implications of extending the automatic roaming obligation in this manner.

78. A number of parties argue that all mobile data services should be included as part of an automatic roaming obligation because demand for mobile data services is growing and its inclusion advances “ubiquitous access to mobile services.”<sup>193</sup> They argue that the market for data services is enormous and growing; data services have become indispensable business tools;<sup>194</sup> and data services provide critical back-up in times of emergency; and data services are essential tools for accessibility to certain segments of the population, such as the hearing-impaired community.<sup>195</sup> Other parties oppose adoption of an automatic roaming rule, as well as any extension of that rule to non-interconnected data services provided over enhanced digital networks.<sup>196</sup> They argue that mandating automatic roaming access to the non-interconnected features of a competitor’s network might undercut incentives to differentiate products and could chill innovation.<sup>197</sup> They also argue that such a requirement could discourage build out of facilities for facilities-based competition and reduce the incentives to access the spectrum through other means such as initial spectrum licensing or secondary markets.<sup>198</sup>

79. We seek comment on whether we should extend automatic roaming obligations to non-interconnected services and features, including information services, and on the legal and policy basis for doing so. As noted previously, allowing competitors in a marketplace to gain competitive advantage from their own innovations results in value to subscribers – in terms of new service offerings and features. To

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<sup>192</sup> See *supra* ¶¶ 2, 53-61.

<sup>193</sup> See SouthernLINC Comments at 13, 18, 48-49; SouthernLINC Reply Comments at 7, 41; AIRPEAK/Airtel Joint Comments at 7. See also Carrier Group Joint Letter *Ex Parte*, July 18, 2007 at 1-2. (The Joint Letter was filed by the following 26 carriers and carrier organizations: Southern Communications Services, Leap Wireless International, United States Cellular Corporation, Cellular South, Rural Cellular Association, Rural Telecommunications Group, National Telecommunications Cooperative Association, NTCH, Comcast Corp., Aloha Partners, Farmers Mutual Cooperative Telephone Company, Wireless Communications Venture, Copper Valley Wireless, Golden West Telecommunications Cooperative, Prairie Wave Communications, Clinton County Telephone, Roberts County Telephone Cooperative Association and RC Communications, McCook Cooperative Telephone Company and Tri-County Telecom, Fisher Wireless Services, AIRTEL Wireless, Coral Wireless, California RSA No. 3 Limited Partnership D/B/A Golden State Cellular, Matanuska Telephone Association, James Valley Cooperative Telephone Company, Oregon Farmers Mutual Telephone Co., Public Service Communications).

<sup>194</sup> See Carrier Group Joint *Ex Parte*, July 18, 2007 at 2.

<sup>195</sup> See, e.g., SouthernLINC *Ex Parte*, July 2 at 2-3.

<sup>196</sup> See ALLTEL Reply Comments at 8; Cingular Reply Comments at 3 & n.8; EDGE Reply Comments at 8-9; Nextel Partners Comments at 12; Sprint Reply Comments at 19-20; T-Mobile Comments at 16; T-Mobile Reply Comments at 14; Verizon Wireless Comments at 22; Verizon Wireless Reply Comments at 24-25.

<sup>197</sup> See, e.g., Verizon Wireless Comments at 22; Verizon Wireless Reply Comments at 24-25.

<sup>198</sup> See, e.g., EDGE Reply Comments at 9 (arguing that forced roaming would thwart market forces by benefiting only those providers that have opted to invest less on their system); NDNC Comments at 3 (arguing against automating roaming rules because they create a disincentive for companies to further develop their networks).

what extent, if any, would requiring roaming access to non-interconnected services and features undermine carriers' incentive to innovate, or to invest in mobile wireless broadband network facilities? Would the potential for undermining innovation be mitigated by conditioning roaming access to non-interconnected services and features, as we have, for example, with push-to-talk and SMS? Namely, should we require that the requesting carrier offer the requested service or feature to its subscribers on its own home network; that roaming must be technically feasible; and any changes to the would-be host carrier's network that are necessary to accommodate roaming requests extending to these services and features must be economically reasonable?

80. If the Commission were to extend automatic roaming obligations to non-interconnected services and features, are there any special issues (technical, economic, or otherwise) associated with roaming among data networks that may not exist when roaming among CMRS carriers' interconnected voice networks? For example, are there any issues regarding network capacity, network integrity, or network security? We seek comment on the effect that automatic roaming would have on the capacity of data networks and the ability of carriers to offer full access to their own customers. We would be concerned if requiring a carrier to offer roaming service on its data network to the customers of other carriers resulted in the carrier facing capacity constraints that adversely affect its own customers. We therefore ask whether a carrier should have the right to limit access to its network by roamers, and what parameters should be considered as justification for such limits. We invite commenters to suggest specific standards for determining when the requirement should or should not apply.

81. If the Commission were to extend automatic roaming obligations to non-interconnected services and features, should all such services and features be included? Are there any public interest reasons to treat narrowband and broadband data services differently in the context of automatic roaming?<sup>199</sup> In the *Wireless Broadband Classification Order*,<sup>200</sup> we determined that mobile wireless broadband Internet access service is an information service, and that it is not CMRS. If we were to impose an automatic roaming obligation on mobile wireless broadband Internet access services, how could we do so in accordance with the determinations in that order? For example, could we base the requirement on Title I ancillary jurisdiction, or on the Title III regulation of radio services? Or should we restrict the automatic roaming mandate only to non-interconnected data services that are not classified as information services? We note that while a few CMRS providers have requested that the Commission require automatic roaming for all services, including non-interconnected data services provided over enhanced digital networks,<sup>201</sup> other CMRS providers, including several small carriers, are against imposing automatic roaming rules for enhanced data services, arguing that forced roaming would thwart

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<sup>199</sup> We note that in the *Wireless Broadband Internet Access Declaratory Ruling*, the Commission stated that the item did not implicate narrowband data services (e.g., one-way paging) and defined the line between broadband and narrowband consistent with the Commission's definition in other contexts (i.e., services with over 200 kbps capability in at least one direction). See *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks, Declaratory Ruling*, 22 FCC Rcd 5901, 5909, n. 55 (2007) (*Wireless Broadband Internet Access Declaratory Ruling*). See also e.g., *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14860 n.15; In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, *Second Report*, 15 FCC Rcd 20913, 20919-20 (2000) (*Second 706 Report*) (defining the term "high speed" to mean infrastructure capable of delivering a speed in excess of 200 kbps in at least one direction). Although this definition remains in effect today, the Commission may examine and modify it for future purposes. Cf. *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14860 n.15.

<sup>200</sup> See generally, *Wireless Broadband Internet Access Declaratory Ruling*, 22 FCC Rcd 5901.

<sup>201</sup> See ACS Comments at 6; MetroPCS Comments at 25 n.58.

market forces by benefiting only those providers that have opted to invest less in their systems.<sup>202</sup> Given these contradictory positions, what is the appropriate balance to be drawn between providing seamless service accessibility to end-users, and allowing service providers to gain competitive advantages from their investments and innovations?

## V. PROCEDURAL MATTERS

### A. Final Regulatory Flexibility Analysis

82. A Final Regulatory Flexibility Analysis has been prepared for the Report and Order and is included in Appendix C.

### B. Initial Regulatory Flexibility Analysis

83. An Initial Regulatory Flexibility Analysis has been prepared for the Further Notice of Proposed Rulemaking and is included in Appendix D.

### C. Ex Parte Presentations

84. The rulemaking shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>203</sup> Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required.<sup>204</sup> Other requirements pertaining to oral and written presentations are set forth in Section 1.1206(b) of the Commission’s rules.<sup>205</sup>

### D. Comment Filing Procedures

85. Pursuant to Sections 1.415 and 1.419 of the Commission’s rules,<sup>206</sup> interested parties may file comments on or before 60 days after publication of the Further Notice of Proposed Rulemaking in the Federal Register and reply comments regarding the Further Notice of Proposed Rulemaking may be filed on or before 90 days after publication of the Further Notice of Proposed Rulemaking in the Federal Register. All filings related to this Further Notice of Rulemaking should refer to WT Docket No. 05-265. Comments may be filed using: (1) the Commission’s Electronic Comment Filing System (ECFS), (2) the Federal Government’s eRulemaking Portal, or (3) by filing paper copies.<sup>207</sup>

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
  - ECFS filers must transmit one electronic copy of the comments for WT Docket No. 05-265. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and WT Docket No. 05-265. Parties may also submit an

<sup>202</sup> See e.g., EDGE Reply Comments at 1, 8-9; see also, NDNC Comments at 3 (arguing against automating roaming rules because they create a disincentive for companies to further develop their networks).

<sup>203</sup> 47 C.F.R. §§ 1.200 *et. seq.*

<sup>204</sup> See 47 C.F.R. § 1.1206(b)(2).

<sup>205</sup> 47 C.F.R. § 1.1206(b).

<sup>206</sup> 47 C.F.R. §§ 1.415, 1.419.

<sup>207</sup> See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov) and include the following words in the body of the message, “get form.” A sample form and directions will be sent in response.

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission’s Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Washington, DC, 20554.
  - The Commission’s contractor will receive hand-delivered or messenger-delivered paper filings for the Commission’s Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
  - U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12<sup>th</sup> Street, S.W., Washington DC 20554.

86. Parties should send a copy of their filings to: Christina Clearwater, Wireless Telecommunications Bureau, 445 12<sup>th</sup> Street, S.W., Washington, D.C. 20554, or by e-mail to [christina.clearwater@fcc.gov](mailto:christina.clearwater@fcc.gov) and Won Kim, Wireless Telecommunications Bureau, 445 12<sup>th</sup> Street, S.W., Washington, D.C. 20554, or by e-mail to [won.kim@fcc.gov](mailto:won.kim@fcc.gov). Parties shall also serve one copy with the Commission’s copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, Room CY-B402, 445 12<sup>th</sup> Street, S.W., Washington, D.C. 20554, (202) 488-5300, or via e-mail to [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com).

87. Documents in WT Docket No. 05-265 will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, Room CY-A257, 445 12<sup>th</sup> Street, S.W., Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com).

88. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to [FCC504@fcc.gov](mailto:FCC504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CARTS, *etc.*) by e-mail: [FCC504@fcc.gov](mailto:FCC504@fcc.gov); phone: 202-418-0530 (voice), 202-418-0432 (TTY).

#### **E. Paperwork Reduction Act**

89. This document does not contain an information collection subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. Therefore, it does not contain any new or modified “information collection burden for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198.<sup>208</sup>

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<sup>208</sup> See 44 U.S.C. 3506(c)(4).



**F. Congressional Review Act**

90. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.<sup>209</sup>

**G. Contact Persons**

91. For further information concerning this rulemaking proceeding, please contact Christina Clearwater, Spectrum and Competition Policy Division at 202-418-1893, Won Kim, Spectrum and Competition Policy Division at 202-418-1368, or Heidi Kroll, Spectrum and Competition Policy Division at 202-418-2361.

**VI. ORDERING CLAUSES**

92. Accordingly, IT IS ORDERED THAT, pursuant to the authority contained in Sections 1, 4(i), 201, 202, 251(a), 253, 303(r), and 332(c)(1)(B) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201, 202, 251(a), 253, 303(r), and 332(c)(1)(B), and Section 1.425 of the Commission's rules, 47 C.F.R. § 1.425, this Report and Order and Further Notice of Rulemaking IS HEREBY ADOPTED.

93. IT IS FURTHER ORDERED THAT Sections 20.3 and 20.12 of the Commission's rules ARE AMENDED as specified in Appendix A, and such rule amendments shall be effective 60 days after the date of publication of the text thereof in the Federal Register.

94. IT IS FURTHER ORDERED THAT the Joint Petition for Commission Inquiry Pursuant to Section 403 of the Communications Act filed by AIRPEAK Communications, LLC, Airtel Wireless LLC, Cleveland Unlimited, Inc., Leap Wireless International, Inc., MetroPCS Communications, Inc., Punxsutawney Communications, Rural Telecommunications Group, Inc., and Southern Communications Services, Inc. d/b/a SouthernLINC Wireless, on April 25, 2006 IS HEREBY DENIED.

95. IT IS FURTHER ORDERED THAT the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order and the Further Notice of Proposed Rulemaking, including the Final Regulatory Flexibility Analysis and the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>209</sup> See 5 U.S.C. 801(a)(1)(A).

**APPENDIX A**  
**Final Rules**

1. The authority citation for Part 20 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 160, 251-254, 303 and 332 unless otherwise noted.

2. Section 20.3 is amended by adding the following terms in their alphabetically correct locations.

**§ 20.3 Definitions.**

\* \* \* \* \*

*Automatic Roaming.* With automatic roaming, under a pre-existing contractual agreement between a subscriber's home carrier and a host carrier, a roaming subscriber is able to originate or terminate a call in the host carrier's service area without taking any special actions.

\* \* \* \* \*

*Home Carrier.* For automatic roaming, a home carrier is the facilities-based CMRS carrier with which a subscriber has a direct contractual relationship. A home carrier may request automatic roaming service from a host carrier on behalf of its subscribers.

\* \* \* \* \*

*Home Market.* For automatic roaming, a CMRS carrier's home market is defined as any geographic location where the home carrier has a wireless license or spectrum usage rights that could be used to provide CMRS.

\* \* \* \* \*

*Host Carrier.* For automatic roaming, the host carrier is a facilities-based CMRS carrier on whose system a subscriber roams when outside its home carrier's home market.

\* \* \* \* \*

*Manual Roaming.* With manual roaming, a subscriber must establish a relationship with the host carrier on whose system he or she wants to roam in order to make a call. Typically, the roaming subscriber accomplishes this in the course of attempting to originate a call by giving a valid credit card number to the carrier providing the roaming service.

\* \* \* \* \*

3. Section 20.12 is amended by revising paragraphs (a) and (c) and adding paragraph (d) as follows:

**§ 20.12 Resale and roaming.**

(a)(1) *Scope of Manual Roaming and Resale.* Paragraph (c) of this section is applicable to providers of Broadband Personal Communications Services (part 24, subpart E of this chapter), Cellular Radio Telephone Service (part 22, subpart H of this chapter), and specialized Mobile Radio Services in the 800 MHz and 900 MHz bands (included in part 90, subpart S of this chapter) if such providers 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 provider to re-use frequencies and accomplish seamless hand-offs of subscriber calls. The scope of paragraph (b) of this section, concerning the resale rule, is further limited so as to exclude from the requirements of that paragraph those Broadband Personal Communications Services C, D, E, and F block licensees that do not own and control and are not owned and controlled by firms also holding cellular A or B block licenses.

(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.

\* \* \* \* \*

(c) *Manual Roaming.* Each carrier subject to paragraph (a)(1) of this section must provide mobile radio service upon request to all subscribers in good standing to the services of any carrier subject to paragraph (a)(1) of this section, including roamers, while such subscribers are located within any portion of the licensee's licensed service area where facilities have been constructed and service to subscribers has commenced, if such subscribers are using mobile equipment that is technically compatible with the licensee's base stations.

(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 home carrier, outside of the requesting home carrier's home market, on reasonable and nondiscriminatory terms and conditions.

**APPENDIX B****List of Commenters****Comments**

ACS Wireless, Inc. (ACS)  
AIRPEAK Communications, LLC (AIRPEAK)  
Airtel Wireless, LLC (Airtel)  
Centennial Communications Corp. (Centennial)  
Cingular Wireless (Cingular)  
Leap Wireless International, Inc. (Leap)  
MetroPCS Communications, Inc. (MetroPCS)  
National Telecommunications Cooperative Association (NTCA)  
Nextel Partners, Inc. (Nextel Partners)  
North Dakota Network Co. (NDNC)  
NTCH, Inc. (NTCH)  
NY3G Partnership (NY3G)  
Organization for the Promotion Advancement of Small Telecommunications Companies (RTG/OPASTCO)  
Rural Cellular Association (RCA)  
Rural Telecommunications Group, Inc.  
Safety and Frequency Equity Competition Coalition (SAFE)  
SouthernLINC Wireless (SouthernLINC)  
Sprint Nextel  
T-Mobile USA, Inc. (T-Mobile)  
United States Cellular Corp. (USCC)  
Verisign, Inc. (Verisign)  
Verizon Wireless  
William Powers

**Reply Comments**

AIRPEAK  
Airtel  
Alaska Native Broadband 1 License, LLC (ANB)  
Alltel Corporation (Alltel)  
Centennial  
Cingular  
Cleveland Unlimited, Inc. (CUI)  
Commnet Wireless, LLC. (Commnet)  
Edge Wireless, LLC (Edge)  
John Staurulakis, Inc.  
Leap  
MetroPCS  
Nextel Partners  
NTCH  
OPASTCO  
Punxsutawney Communications, LLC (Punxsutawney)  
RTG  
SLO Cellular, Inc. (SLO)  
SouthernLINC  
Sprint Nextel

SunCom Wireless, Inc. (SunCom)  
T-Mobile  
Unicom, Inc. (Unicom)  
USCC  
Verizon Wireless  
Wireless Communications Association International, Inc. (WCA)

**Joint Section 403 Petition Commenters**

**Joint Petition: April 25, 2006**

AIRPEAK  
Airtel  
Cleveland  
Leap  
MetroPCS  
Punxsutawney  
RTG  
SouthernLINC

**Oppositions: May 5, 2006**

Cingular  
Sprint/Nextel  
Verizon Wireless

**Reply: May 12, 2006**

AIRPEAK  
Airtel  
Cleveland  
Leap  
MetroPCS  
Punxsutawney  
RTG  
SouthernLINC

## APPENDIX C

## Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *NPRM* in WT Docket No. 05-265.<sup>2</sup> The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>3</sup>

**A. Need for, and Objectives of, the Report and Order**

2. In the *Report and Order*, with regard to commercial services, the Commission takes an affirmative step to facilitate the provision of wireless services to consumers, especially those in rural areas, and to clarify our rules related to the roaming. The Commission clarifies that automatic roaming is a common carrier obligation for CMRS carriers, requiring them to provide roaming services to other carriers upon reasonable request and on a just, reasonable, and non-discriminatory basis pursuant to Sections 201 and 202 of the Communications Act. The Commission reiterates its earlier determination that roaming is a common carrier service because roaming capability gives end users access to a foreign network in order to communicate messages of their own choosing. Thus, the provision of roaming is subject to the requirements of Section 201, 202, and 208 of the Communications Act.<sup>4</sup>

3. The Commission also finds that the common carrier obligation to provide roaming extends to services that are real-time, two-way switched voice or data service that are interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls. The Commission notes that roaming, as a common carrier obligation, does not extend to services that are classified as information services or to services that are not CMRS.<sup>5</sup>

4. The Commission recognizes that today CMRS consumers increasingly rely on mobile telephony services and they reasonably expect to continue their wireless communications even when they are out of their home network area. Thus, the findings in this *Report and Order* with respect to CMRS providers' obligations regarding roaming services serve the public interest and safeguard wireless consumers' reasonable expectations of seamless continuous nationwide commercial mobile telephony services through roaming. The Commission also declines to sunset the existing manual roaming

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> See In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services, *Memorandum Opinion & Order and Notice of Proposed Rulemaking*, WT Docket No. 05-265, 20 FCC Rcd 15047, 15068 App. (2005) (“*MO&O*” and “*NPRM*,” respectively).

<sup>3</sup> See 5 U.S.C. § 604.

<sup>4</sup> See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services, WT Docket No. 05-265, *Memorandum Opinion & Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 15047, 15048 ¶ 2 (2005) (“*Reexamination NPRM*”); Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, *Second Report and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 9462, 9463-71 ¶¶ 1-14 (1996) (“*Interconnection and Resale Obligations Second Report and Order*” and “*Interconnection and Resale Obligations Third NPRM*,” respectively). See also 47 C.F.R. § 20.15. Section 332(c)(1) of the Act provides that a person engaged in the provision of a service that is a commercial mobile service shall be treated as a common carrier for purposes of the Act. See 47 U.S.C. § 332(c)(1).

<sup>5</sup> Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, *Declaratory Ruling*, FCC No. 07-30, ¶¶ 11-12 (rel. Mar. 23, 2007) (“*Wireless Broadband Internet Access Declaratory Ruling*”).

requirement at this time to provide additional flexibility for consumers.

**B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA**

5. There were no comments filed specifically in response to the IRFA.

**C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply**

6. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the proposed rules, if adopted.<sup>6</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>7</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>8</sup> A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>9</sup>

7. In the following paragraphs, the Commission further describes and estimates the number of small entity licensees that may be affected by the rules the Commission adopts in this *Report and Order*. The Commission’s finding that automatic roaming is a common carrier service subject to protections outlined in sections 201, 202 and 208 of the Act affects all CMRS carriers that provide real-time, two-way switched voice or data service that are interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls. Such carriers are obligated to provide automatic roaming. As a common carrier obligation, the automatic roaming rule does not extend to non-interconnected services/features or services that are classified as information services or to services that are not CMRS.

8. Since this *Report and Order* applies to multiple services, this FRFA analyzes the number of small entities affected on a service-by-service basis. When identifying small entities that could be affected by the Commission’s new rules, this FRFA provides information that describes auctions results, including the number of small entities that were winning bidders. However, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily reflect the total number of small entities currently in a particular service. The Commission does not generally require that licensees later provide business size information, except in the context of an assignment or a transfer of control application that involves unjust enrichment issues.

9. *Wireless Service Providers*. The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of “Paging”<sup>10</sup> and “Cellular and Other Wireless Telecommunications.”<sup>11</sup> Under both categories, the SBA deems a wireless business to be small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 2002 show

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<sup>6</sup> 5 U.S.C. § 604(a)(3).

<sup>7</sup> 5 U.S.C. § 601(6).

<sup>8</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

<sup>9</sup> 15 U.S.C. § 632.

<sup>10</sup> 13 C.F.R. § 121.201, NAICS code 517211.

<sup>11</sup> 13 C.F.R. § 121.201, NAICS code 517212.

that there were 807 firms in this category that operated for the entire year.<sup>12</sup> Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.<sup>13</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.<sup>14</sup> Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.<sup>15</sup> Thus, under this second category and size standard, the majority of firms can, again, be considered small.

10. *Cellular Licensees.* The SBA has developed a small business size standard for small businesses in the category “Cellular and Other Wireless Telecommunications.”<sup>16</sup> Under that SBA category, a business is small if it has 1,500 or fewer employees.<sup>17</sup> For the census category of “Cellular and Other Wireless Telecommunications,” Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.<sup>18</sup> Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.<sup>19</sup> Thus, under this category and size standard, the majority of firms can be considered small.

11. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>20</sup> For Block F, an additional small business size standard for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>21</sup> These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.<sup>22</sup> No small businesses within the

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<sup>12</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization,” Table 5, NAICS code 517211 (issued Nov. 2005).

<sup>13</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

<sup>14</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization,” Table 5, NAICS code 517212 (issued Nov. 2005).

<sup>15</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

<sup>16</sup> 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517212.

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

<sup>18</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization,” Table 5, NAICS code 517212 (issued Nov. 2005).

<sup>19</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

<sup>20</sup> See Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7850-7852 ¶¶ 57-60 (1996); see also 47 C.F.R. § 24.720(b).

<sup>21</sup> See Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7852 ¶ 60.

<sup>22</sup> See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.



SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the C Block auctions. A total of 93 “small” and “very small” business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.<sup>23</sup> On March 23, 1999, the Commission reaucted 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.<sup>24</sup> On January 26, 2001, the Commission completed the auction of 422 C and F PCS licenses in Auction 35.<sup>25</sup> Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses. Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

12. *Narrowband Personal Communications Service.* The Commission held an auction for Narrowband Personal Communications Service (PCS) licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less.<sup>26</sup> Through these auctions, the Commission awarded a total of forty-one licenses, 11 of which were obtained by four small businesses.<sup>27</sup> To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.<sup>28</sup> A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.<sup>29</sup> A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.<sup>30</sup> The SBA has approved these small business size standards.<sup>31</sup> A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (MTA and nationwide) licenses.<sup>32</sup> Three of these claimed status as a small or very small entity and won 311 licenses.

13. *Specialized Mobile Radio.* The Commission awards “small entity” bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to

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<sup>23</sup> FCC News, “Broadband PCS, D, E and F Block Auction Closes,” No. 71744 (rel. January 14, 1997).

<sup>24</sup> See “C, D, E, and F Block Broadband PCS Auction Closes,” *Public Notice*, 14 FCC Rcd 6688 (WTB 1999).

<sup>25</sup> See “C and F Block Broadband PCS Auction Closes; Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 2339 (2001).

<sup>26</sup> Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175, 196 ¶ 46 (1994).

<sup>27</sup> See “Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674,” *Public Notice*, PNWL 94-004 (rel. Aug. 2, 1994); “Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total \$490,901,787,” *Public Notice*, PNWL 94-27 (rel. Nov. 9, 1994).

<sup>28</sup> Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476 ¶ 40 (2000).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

<sup>32</sup> See “Narrowband PCS Auction Closes,” *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

firms that had revenues of no more than \$15 million in each of the three previous calendar years.<sup>33</sup> The Commission awards “very small entity” bidding credits to firms that had revenues of no more than \$3 million in each of the three previous calendar years.<sup>34</sup> The SBA has approved these small business size standards for the 900 MHz Service.<sup>35</sup> The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.<sup>36</sup> A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.<sup>37</sup>

14. The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed “small business” status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

15. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$3 million or \$15 million (the special small business size standards), or have no more than 1,500 employees (the generic SBA standard for wireless entities, discussed, *supra*). One firm has over \$15 million in revenues. The Commission assumes, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities.

16. *Advanced Wireless Services*. In the *AWS-1 Report and Order*, the Commission adopted rules that affect applicants who wish to provide service in the 1710-1755 MHz and 2110-2155 MHz bands.<sup>38</sup> The *AWS-1 Report and Order* defines a “small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million, and a “very small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$15 million. The *AWS-1 Report and Order* also provides small businesses with a bidding credit of 15 percent and very small businesses with a bidding credit of 25 percent.

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<sup>33</sup> 47 C.F.R. § 90.814(b)(1).

<sup>34</sup> *Id.*

<sup>35</sup> See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999.

<sup>36</sup> See “Correction to Public Notice DA 96-586 ‘FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,’” *Public Notice*, 18 FCC Rcd 18367 (WTB 1996).

<sup>37</sup> See “Multi-Radio Service Auction Closes,” *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

<sup>38</sup> Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, WT Docket No. 02-353, *Report and Order*, 18 FCC Rcd 25162 (2003) (*AWS-1 Report and Order*).

17. *Rural Radiotelephone Service*. The Commission uses the SBA small business size standard applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons.<sup>39</sup> There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

18. *Wireless Communications Services*. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses in the 2305-2320 MHz and 2345-2360 MHz bands. The Commission defined “small business” for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” as an entity with average gross revenues of \$15 million for each of the three preceding years.<sup>40</sup> The SBA has approved these definitions.<sup>41</sup> The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity.

19. *220 MHz Radio Service – Phase I Licensees*. The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz Band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, the Commission applies the small business size standard under the SBA rules applicable to “Cellular and Other Wireless Telecommunications” companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.<sup>42</sup> For the census category of “Cellular and Other Wireless Telecommunications,” Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.<sup>43</sup> Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.<sup>44</sup> Thus, under this category and size standard, the majority of firms can be considered small.

20. *220 MHz Radio Service – Phase II Licensees*. The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is subject to spectrum auctions. In the *220 MHz Third Report and Order*, the Commission adopted a small business size standard for defining “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>45</sup> This small business standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding

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<sup>39</sup> 13 C.F.R. § 121.201, NAICS code 517212.

<sup>40</sup> Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (WCS), *Report and Order*, 12 FCC Rcd 10785, 10879 ¶ 194 (1997).

<sup>41</sup> See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

<sup>42</sup> 13 C.F.R. § 121.201, NAICS code 517212.

<sup>43</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization,” Table 5, NAICS code 517212 (issued Nov. 2005).

<sup>44</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

<sup>45</sup> Amendment of Part 90 of the Commission’s Rules to Provide For the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, *Third Report and Order*, 12 FCC Rcd 10943, 11068-70 ¶¶ 291-295 (1997).

\$15 million for the preceding three years.<sup>46</sup> A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years.<sup>47</sup> The SBA has approved these small size standards.<sup>48</sup> Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.<sup>49</sup> In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold.<sup>50</sup> Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.<sup>51</sup> A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.<sup>52</sup>

21. *700 MHz Guard Band Licenses.* In the *700 MHz Guard Band Order*, the Commission adopted size standards for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>53</sup> A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.<sup>54</sup> Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.<sup>55</sup> SBA approval of these definitions is not required.<sup>56</sup> An auction of 52 Major Economic Area (MEA) licenses commenced on

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<sup>46</sup> *Id.* at 11068 ¶ 291.

<sup>47</sup> *Id.*

<sup>48</sup> See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

<sup>49</sup> See generally “220 MHz Service Auction Closes,” *Public Notice*, 14 FCC Rcd 605 (WTB 1998).

<sup>50</sup> See “FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made,” *Public Notice*, 14 FCC Rcd 1085 (WTB 1999).

<sup>51</sup> See “Phase II 220 MHz Service Spectrum Auction Closes,” *Public Notice*, 14 FCC Rcd 11218 (WTB 1999).

<sup>52</sup> See “Multi-Radio Service Auction Closes,” *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

<sup>53</sup> Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Report and Order*, 15 FCC Rcd 5299 (2000). Service rules were amended in 2007, but no changes were made to small business size categories. See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket 03-264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 06-169, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 8064 (2007).

<sup>54</sup> *Id.* at 5343 ¶ 108.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* At 5343 ¶ 108 n.246 (for the 746-764 MHz and 776-704 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain Small Business Administration approval before adopting small business size standards).

September 6, 2000, and closed on September 21, 2000.<sup>57</sup> Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.<sup>58</sup>

22. *Upper 700 MHz Band Licenses.* The Commission released a *Report and Order* authorizing service in the Upper 700 MHz band.<sup>59</sup> An auction for these licenses, previously scheduled for January 13, 2003, was postponed.<sup>60</sup>

23. *Lower 700 MHz Band Licenses.* The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.<sup>61</sup> The Commission has defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.<sup>62</sup> A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.<sup>63</sup> Additionally, the Lower 700 MHz Band has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.<sup>64</sup> The SBA has approved these small size standards.<sup>65</sup> An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on

<sup>57</sup> See “700 MHz Guard Bands Auction Closes: Winning Bidders Announced,” *Public Notice*, 15 FCC Rcd 18026 (2000).

<sup>58</sup> See “700 MHz Guard Bands Auctions Closes: Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 4590 (WTB 2001).

<sup>59</sup> Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Memorandum Opinion and Order*, 16 FCC Rcd 1239 (2001). Service rules were amended in 2007, but no changes were made to small business size categories. See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket 03-264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 06-169, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 8064 (2007).

<sup>60</sup> See “Auction of Licenses for 747-762 and 777-792 MHz Bands (Auction No. 31) Is Rescheduled,” *Public Notice*, 16 FCC Rcd 13079 (WTB 2003).

<sup>61</sup> See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022 (2002).

<sup>62</sup> *Id.* at 1087-88 ¶ 172.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1088 ¶ 173.

<sup>65</sup> See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999.

September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.<sup>66</sup> A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 CMA licenses.<sup>67</sup> Seventeen winning bidders claimed small or very small business status and won sixty licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.<sup>68</sup>

**D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities**

24. The only reporting or recordkeeping costs to be incurred are administrative costs to ensure that an entity's practices are in compliance with the rule. The only compliance requirement is that CMRS carriers must provide automatic roaming to any requesting technologically compatible CMRS carrier outside of the requesting CMRS carrier's home market on reasonable and non-discriminatory terms and conditions. This rule applies to CMRS carriers that offer real-time, two-way switched voice or data service over digital network that is interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls.<sup>69</sup>

**E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered**

25. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>70</sup>

26. In this *Report and Order*, the Commission clarifies that automatic roaming is a common carrier obligation for CMRS carriers, requiring them to provide roaming services to other carriers upon reasonable request and on a just, reasonable, and non-discriminatory basis pursuant to Sections 201 and 202 of the Communications Act. In adopting this rule, the Commission determined that when a reasonable request is made by a technologically compatible CMRS carrier, a host CMRS carrier must provide automatic roaming to the requesting carrier outside of the requesting carrier's home market, consistent with the protections of Sections 201 and 202 of the Communications Act.

27. In the *Report and Order*, the Commission finds that the scope of automatic roaming services includes only services offered by CMRS carriers that are real-time, two-way switched voice or data services that are interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls. In addition, the Commission determines that it would serve the public interest to extend automatic roaming obligation to push-to-talk and text messaging (SMS). However, the Commission declines to

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<sup>66</sup> See "Lower 700 MHz Band Auction Closes," *Public Notice*, 17 FCC Rcd 17272 (WTB 2002).

<sup>67</sup> See "Lower 700 MHz Band Auction Closes," *Public Notice*, 18 FCC Rcd 11873 (WTB 2003).

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

<sup>69</sup> See *Report and Order*, *supra*, ¶¶ 28-29.

<sup>70</sup> See 5 U.S.C. § 603(c).

adopt a rule extending the automatic roaming obligation beyond that to offerings that do not fall within the scope of the automatic roaming services' definition, such as non-interconnected services or features or services that are classified as information services or to services that are not CMRS.<sup>71</sup>

28. In response to the *Reexamination NPRM*, some of the commenters requested that the Commission cap the rates that a carrier may charge other carriers for automatic roaming service based on some benchmark of retail rates.<sup>72</sup> Some of these commenters have also submitted economic analyses in support of their proposals.<sup>73</sup> Other commenters oppose any rate regulation and, in turn, have submitted their own economic analyses disputing the theory and evidence used to justify the imposition of rate regulation.<sup>74</sup> In the *Report and Order*, the Commission declines to impose a price cap or any other form of rate regulation on the fees carriers pay each other when one carrier's customer roams on another carrier's network. The Commission believes that the rates individual carriers pay for automatic roaming services should be determined in the marketplace through negotiations between the carriers, subject to the statutory requirement that any rates charged be reasonable and non-discriminatory.

29. The Commission reiterates that the general policy regarding CMRS services is to allow competitive market forces, rather than regulations, to promote the development of wireless services. On balance, taking into consideration the concerns raised in the record by certain CMRS carriers<sup>75</sup> and its preference for allowing competitive market forces to govern rate and rate structures for wireless services, the Commission expressly declines to impose any corresponding rate regulation of automatic roaming services.

30. In the *Reexamination NPRM*, the Commission sought comment on whether a carrier should be required to enter into an automatic roaming arrangement on a nondiscriminatory basis with a facilities-based-competitor in the same market. In the *Report and Order*, the Commission determines that the automatic roaming obligation does not include an in-market or home roaming requirement. The Commission finds that an automatic roaming request in the home area of a requesting CMRS carrier, the area where the requesting CMRS carrier has the spectrum to compete directly with the would-be host carrier, does not serve public interest goals of encouraging facilities-based service and supporting consumer expectations of seamless coverage when traveling outside the home area.

31. In the *Reexamination NPRM*, the Commission sought comment on access to push-to-talk,

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<sup>71</sup> Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, *Declaratory Ruling*, FCC No. 07-30, ¶¶ 11-12 (rel. Mar. 23, 2007) ("*Wireless Broadband Internet Access Declaratory Ruling*").

<sup>72</sup> See Leap Comments at 17, 19-20 (recommending that, in geographic areas where there are three or fewer facilities-based carriers from which the carrier seeking automatic roaming service could obtain such service, the Commission prohibit a facilities-based carrier from charging rates for automatic roaming that exceed the carrier's average retail revenue per minute for that area). See also SouthernLINC Comments at 49 (proposing that the Commission establish a presumption that a carrier's roaming rates in a region are unreasonable if they exceed the lowest prevailing per-minute retail rates that it charges its own subscribers in that region).

<sup>73</sup> See, e.g., Leap Comments, Attachment A (ERS Group, *Wholesale Pricing Methods of Nationwide Carriers Providing Commercial Mobile Radio Services: An Economic Analysis*); SouthernLINC Comments, Attachment B (R. Preston McAfee, *The Economics of Wholesale Roaming in CMRS Markets*); SouthernLINC Reply Comments, Attachment B (R. Preston McAfee, *The Economics of Wholesale Roaming in CMRS Markets: Reply Comments*); Leap Reply Comments, Attachment A (David S. Sibley, *The Existence of Regional, Technology-Specific Wholesale Antitrust Markets for Roaming Services*); Leap Reply Comments, Attachment B (ERS Group, *A Further Analysis of the Wholesale Pricing Methods of Nationwide Carriers Providing Commercial Mobile Radio Service*).

<sup>74</sup> See, e.g., Rosston/Sprint Nextel Comments; Rosston/Sprint Nextel Reply Comments; Hazlett/Cingular Reply Comments; Furchtgott-Roth/T-Mobile Reply Comments.

<sup>75</sup> See, e.g., Cingular Comments at i, 18-30; NDNC Comments at 3; Nextel Partners Comments at 5-6.

dispatch, or other data roaming. Some carriers advocate that the Commission should adopt an automatic roaming rule that requires carriers to permit roaming access to all technical features of their systems, and/or require carriers to make the same features accessible to all of their roaming partners (e.g., push-to-talk, dispatch, text messaging (SMS) or other data roaming services). Based on the record, in the *Report and Order*, the Commission finds that it would serve public interest to extend automatic roaming obligations to push-to-talk and SMS. However, the Commission declines to adopt a rule extending the automatic roaming obligation beyond that to offerings that do not fall within the scope of the automatic roaming services' definition, such as non-interconnected services or features. With respect to push-to-talk and SMS, the Commission finds that such offerings are typically bundled as a feature on the handset with other CMRS services, such as real-time, two-way switched mobile voice or data, which are interconnected with the public switched network. Thus, consumers consider push-to-talk and SMS 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.

32. With respect to non-interconnected data service, the Commission finds that it is not in the public interest at this time to impose an automatic roaming obligation. In the absence of a clear showing in the record that it would serve the public interest, the Commission believes that open access to the non-interconnected features of a competitor's network might undercut incentives to differentiate products and could chill innovation. It may also adversely affect business decisions to build out facilities for facilities-based competition and reduce the incentives to access the spectrum through other means such as initial spectrum licensing or secondary markets. For these reasons, the Commission declines to impose an automatic roaming requirement on non-interconnected features, such as stand alone dispatch, at this time.

33. In the *Report and Order*, the Commission also declines to impose an affirmative obligation on CMRS carriers to post their roaming rates. The Commission notes that roaming agreements are generally confidential and filing them would impose administrative costs on the carriers. In light of the adoption of an automatic roaming rule, the Commission finds that the available remedies for redress are sufficient to address disputes that may arise. Therefore, the Commission finds it unnecessary to burden CMRS carriers by requiring them to file roaming agreements.

#### **F. Report to Congress**

34. The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.<sup>76</sup> In addition, the Commission will send a copy of the *Report and Order*, including the FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Report and Order* and the FRFA (or summaries thereof) will also be published in the Federal Register.<sup>77</sup>

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<sup>76</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>77</sup> See 5 U.S.C. § 604(b).



## APPENDIX D

## Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (the “RFA”),<sup>1</sup> the Commission has prepared this Initial Regulatory Flexibility Analysis (“IRFA”) of the possible significant economic impact of the policies and rules proposed in the *Further Notice of Proposed Rulemaking* (“*Further Notice*”) on a substantial number of small entities. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Further Notice* provided in the item. The Commission will send a copy of the *Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).<sup>2</sup> In addition, the *Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

**A. Need for, and Objectives of, the Proposed Rules**

2. Building on the decisions made in the *Report and Order*, the *Further Notice* encompasses issues concerning the applicability of the automatic roaming obligation for all wireless providers. In the *Report and Order*, the Commission clarifies that the automatic roaming is a common carrier obligation and adopts an automatic roaming rule that is applicable to services offered by CMRS carriers that are real-time, two-way switched voice or data services that are interconnected with the public switched network, and to push-to-talk and text messaging service.<sup>4</sup> Recognizing wireless subscribers’ increasing reliance on mobile telephony services, especially the growing demand of data services by consumers, the *Further Notice* seeks comment on whether the Commission should extend the applicability of the automatic roaming requirements to non-interconnected services or features, including services that have been classified as information services, such as wireless broadband Internet access service, or other non-CMRS services. The *Further Notice* further seeks comment on the implications of extending the automatic roaming obligation in this manner. The Commission’s primary objective in this proceeding is to facilitate seamless wireless communications for consumers, even when they are outside of the coverage area of their own service providers.

3. In the *Further Notice*, the Commission notes that while a few CMRS providers have requested that the Commission require automatic roaming for all services, including non-interconnected data services provided over enhanced digital networks,<sup>5</sup> other CMRS providers, including several small carriers, are against imposing automatic roaming rules for enhanced data services, arguing that forced roaming would thwart market forces by benefiting only those providers that have opted to invest less on their systems.<sup>6</sup> Given these contradictory positions, the *Further Notice* seeks comments on what is the appropriate balance to be drawn between providing seamless service accessibility to end-users, and allowing service providers to gain competitive advantages from their investments and innovations.

**B. Legal Basis**

4. The authority for the actions taken in this *Further Notice* is contained in Sections 1, 4(i),

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<sup>1</sup> The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> *See* 5 U.S.C. § 603(a).

<sup>3</sup> *See* 5 U.S.C. § 603(a).

<sup>4</sup> *See supra* ¶¶ 2, 65-67.

<sup>5</sup> *See* ACS Comments at 6; MetroPCS Comments at 25 n.58.

<sup>6</sup> *See e.g.*, EDGE Reply Comments at 1, 8-9; *see also*, NDNC Comments at 3 (arguing against automating roaming rules because they create a disincentive for companies to further develop their networks).

201, 202, 251(a), 253, 303(r), and 332(c)(1)(B) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201, 202, 251(a), 253, 303(r), and 332(c)(1)(B).

**C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

5. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the proposed rules, if adopted.<sup>7</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>8</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>9</sup> A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>10</sup>

6. In the following paragraphs, the Commission further describes and estimates the number of small entity licensees that may be affected by the rules the Commission adopts in this *Report and Order*. The Commission’s finding that automatic roaming is a common carrier service subject to protections outlined in sections 201, 202 and 208 of the Act affects all CMRS carriers that provide real-time, two-way switched voice or data service that are interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls. Such carriers are obligated to provide automatic roaming. As a common carrier obligation, the automatic roaming rule does not extend to non-interconnected services/features or services that are classified as information services or to services that are not CMRS.

7. Since this *Report and Order* applies to multiple services, this FRFA analyzes the number of small entities affected on a service-by-service basis. When identifying small entities that could be affected by the Commission’s new rules, this FRFA provides information that describes auctions results, including the number of small entities that were winning bidders. However, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily reflect the total number of small entities currently in a particular service. The Commission does not generally require that licensees later provide business size information, except in the context of an assignment or a transfer of control application that involves unjust enrichment issues.

8. *Wireless Service Providers*. The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of “Paging”<sup>11</sup> and “Cellular and Other Wireless Telecommunications.”<sup>12</sup> Under both categories, the SBA deems a wireless business to be small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 2002 show

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<sup>7</sup> 5 U.S.C. § 604(a)(3).

<sup>8</sup> 5 U.S.C. § 601(6).

<sup>9</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

<sup>10</sup> 15 U.S.C. § 632.

<sup>11</sup> 13 C.F.R. § 121.201, NAICS code 517211.

<sup>12</sup> 13 C.F.R. § 121.201, NAICS code 517212.

that there were 807 firms in this category that operated for the entire year.<sup>13</sup> Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.<sup>14</sup> Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.<sup>15</sup> Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.<sup>16</sup> Thus, under this second category and size standard, the majority of firms can, again, be considered small.

9. *Cellular Licensees.* The SBA has developed a small business size standard for small businesses in the category “Cellular and Other Wireless Telecommunications.”<sup>17</sup> Under that SBA category, a business is small if it has 1,500 or fewer employees.<sup>18</sup> For the census category of “Cellular and Other Wireless Telecommunications,” Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.<sup>19</sup> Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.<sup>20</sup> Thus, under this category and size standard, the majority of firms can be considered small.

10. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>21</sup> For Block F, an additional small business size standard for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>22</sup> These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.<sup>23</sup> No small businesses within the

<sup>13</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization,” Table 5, NAICS code 517211 (issued Nov. 2005).

<sup>14</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

<sup>15</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization,” Table 5, NAICS code 517212 (issued Nov. 2005).

<sup>16</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

<sup>17</sup> 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517212.

<sup>18</sup> *Id.*

<sup>19</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization,” Table 5, NAICS code 517212 (issued Nov. 2005).

<sup>20</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

<sup>21</sup> See Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7850-7852 ¶¶ 57-60 (1996); see also 47 C.F.R. § 24.720(b).

<sup>22</sup> See Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7852 ¶ 60.

<sup>23</sup> See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the C Block auctions. A total of 93 “small” and “very small” business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.<sup>24</sup> On March 23, 1999, the Commission reaucted 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.<sup>25</sup> On January 26, 2001, the Commission completed the auction of 422 C and F PCS licenses in Auction 35.<sup>26</sup> Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses. Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

11. *Narrowband Personal Communications Service.* The Commission held an auction for Narrowband Personal Communications Service (PCS) licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less.<sup>27</sup> Through these auctions, the Commission awarded a total of forty-one licenses, 11 of which were obtained by four small businesses.<sup>28</sup> To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.<sup>29</sup> A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.<sup>30</sup> A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.<sup>31</sup> The SBA has approved these small business size standards.<sup>32</sup> A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (MTA and nationwide) licenses.<sup>33</sup> Three of these claimed status as a small or very small entity and won 311 licenses.

12. *Specialized Mobile Radio.* The Commission awards “small entity” bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to

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<sup>24</sup> FCC News, “Broadband PCS, D, E and F Block Auction Closes,” No. 71744 (rel. January 14, 1997).

<sup>25</sup> See “C, D, E, and F Block Broadband PCS Auction Closes,” *Public Notice*, 14 FCC Rcd 6688 (WTB 1999).

<sup>26</sup> See “C and F Block Broadband PCS Auction Closes; Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 2339 (2001).

<sup>27</sup> Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175, 196 ¶ 46 (1994).

<sup>28</sup> See “Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674,” *Public Notice*, PNWL 94-004 (rel. Aug. 2, 1994); “Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total \$490,901,787,” *Public Notice*, PNWL 94-27 (rel. Nov. 9, 1994).

<sup>29</sup> Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476 ¶ 40 (2000).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

<sup>33</sup> See “Narrowband PCS Auction Closes,” *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

firms that had revenues of no more than \$15 million in each of the three previous calendar years.<sup>34</sup> The Commission awards “very small entity” bidding credits to firms that had revenues of no more than \$3 million in each of the three previous calendar years.<sup>35</sup> The SBA has approved these small business size standards for the 900 MHz Service.<sup>36</sup> The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.<sup>37</sup> A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.<sup>38</sup>

13. The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed “small business” status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

14. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$3 million or \$15 million (the special small business size standards), or have no more than 1,500 employees (the generic SBA standard for wireless entities, discussed, *supra*). One firm has over \$15 million in revenues. The Commission assumes, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities.

15. *Advanced Wireless Services.* In the *AWS-1 Report and Order*, the Commission adopted rules that affect applicants who wish to provide service in the 1710-1755 MHz and 2110-2155 MHz bands.<sup>39</sup> The *AWS-1 Report and Order* defines a “small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million, and a “very small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$15 million. The *AWS-1 Report and Order* also provides small businesses with a bidding credit of 15 percent and very small businesses with a bidding credit of 25 percent.

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<sup>34</sup> 47 C.F.R. § 90.814(b)(1).

<sup>35</sup> *Id.*

<sup>36</sup> See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999.

<sup>37</sup> See “Correction to Public Notice DA 96-586 ‘FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,’” *Public Notice*, 18 FCC Rcd 18367 (WTB 1996).

<sup>38</sup> See “Multi-Radio Service Auction Closes,” *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

<sup>39</sup> Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, WT Docket No. 02-353, *Report and Order*, 18 FCC Rcd 25162 (2003) (*AWS-1 Report and Order*).

16. *Rural Radiotelephone Service*. The Commission uses the SBA small business size standard applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons.<sup>40</sup> There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

17. *Wireless Communications Services*. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses in the 2305-2320 MHz and 2345-2360 MHz bands. The Commission defined “small business” for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” as an entity with average gross revenues of \$15 million for each of the three preceding years.<sup>41</sup> The SBA has approved these definitions.<sup>42</sup> The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity.

18. *220 MHz Radio Service – Phase I Licensees*. The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz Band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, the Commission applies the small business size standard under the SBA rules applicable to “Cellular and Other Wireless Telecommunications” companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.<sup>43</sup> For the census category of “Cellular and Other Wireless Telecommunications,” Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.<sup>44</sup> Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.<sup>45</sup> Thus, under this category and size standard, the majority of firms can be considered small.

19. *220 MHz Radio Service – Phase II Licensees*. The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is subject to spectrum auctions. In the *220 MHz Third Report and Order*, the Commission adopted a small business size standard for defining “small” and “very small” businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>46</sup> This small business standard indicates that a “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding

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<sup>40</sup> 13 C.F.R. § 121.201, NAICS code 517212.

<sup>41</sup> Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (WCS), *Report and Order*, 12 FCC Rcd 10785, 10879 ¶ 194 (1997).

<sup>42</sup> See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

<sup>43</sup> 13 C.F.R. § 121.201, NAICS code 517212.

<sup>44</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization,” Table 5, NAICS code 517212 (issued Nov. 2005).

<sup>45</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

<sup>46</sup> Amendment of Part 90 of the Commission’s Rules to Provide For the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, *Third Report and Order*, 12 FCC Rcd 10943, 11068-70 ¶¶ 291-295 (1997).

\$15 million for the preceding three years.<sup>47</sup> A “very small business” is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years.<sup>48</sup> The SBA has approved these small size standards.<sup>49</sup> Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.<sup>50</sup> In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold.<sup>51</sup> Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.<sup>52</sup> A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.<sup>53</sup>

20. *700 MHz Guard Band Licenses.* In the *700 MHz Guard Band Order*, the Commission adopted size standards for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>54</sup> A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.<sup>55</sup> Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.<sup>56</sup> SBA approval of these definitions is not required.<sup>57</sup> An auction of 52 Major Economic Area (MEA) licenses commenced on

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<sup>47</sup> *Id.* at 11068 ¶ 291.

<sup>48</sup> *Id.*

<sup>49</sup> See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

<sup>50</sup> See generally “220 MHz Service Auction Closes,” *Public Notice*, 14 FCC Rcd 605 (WTB 1998).

<sup>51</sup> See “FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made,” *Public Notice*, 14 FCC Rcd 1085 (WTB 1999).

<sup>52</sup> See “Phase II 220 MHz Service Spectrum Auction Closes,” *Public Notice*, 14 FCC Rcd 11218 (WTB 1999).

<sup>53</sup> See “Multi-Radio Service Auction Closes,” *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

<sup>54</sup> Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Report and Order*, 15 FCC Rcd 5299 (2000). Service rules were amended in 2007, but no changes were made to small business size categories. See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket 03-264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 06-169, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 8064 (2007).

<sup>55</sup> *Id.* at 5343 ¶ 108.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* At 5343 ¶ 108 n.246 (for the 746-764 MHz and 776-704 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain Small Business Administration approval before adopting small business size standards).

September 6, 2000, and closed on September 21, 2000.<sup>58</sup> Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.<sup>59</sup>

21. Upper 700 MHz Band Licenses. The Commission released a *Report and Order* authorizing service in the Upper 700 MHz band.<sup>60</sup> An auction for these licenses, previously scheduled for January 13, 2003, was postponed.<sup>61</sup>

22. Lower 700 MHz Band Licenses. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.<sup>62</sup> The Commission has defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.<sup>63</sup> A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.<sup>64</sup> Additionally, the Lower 700 MHz Band has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.<sup>65</sup> The SBA has approved these small size standards.<sup>66</sup> An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on

<sup>58</sup> See “700 MHz Guard Bands Auction Closes: Winning Bidders Announced,” *Public Notice*, 15 FCC Rcd 18026 (2000).

<sup>59</sup> See “700 MHz Guard Bands Auctions Closes: Winning Bidders Announced,” *Public Notice*, 16 FCC Rcd 4590 (WTB 2001).

<sup>60</sup> Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Memorandum Opinion and Order*, 16 FCC Rcd 1239 (2001). Service rules were amended in 2007, but no changes were made to small business size categories. See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket 03-264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 06-169, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 8064 (2007).

<sup>61</sup> See “Auction of Licenses for 747-762 and 777-792 MHz Bands (Auction No. 31) Is Rescheduled,” *Public Notice*, 16 FCC Rcd 13079 (WTB 2003).

<sup>62</sup> See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022 (2002).

<sup>63</sup> *Id.* at 1087-88 ¶ 172.

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

<sup>65</sup> *Id.* at 1088 ¶ 173.

<sup>66</sup> See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999.



September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.<sup>67</sup> A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 CMA licenses.<sup>68</sup> Seventeen winning bidders claimed small or very small business status and won sixty licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.<sup>69</sup>

23. *Common Carrier Paging.* The SBA has developed a small business size standard for wireless firms within the broad economic census category of "Paging."<sup>70</sup> Under this category, the SBA deems a business to be small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year.<sup>71</sup> Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.<sup>72</sup> Thus, under this category, the majority of firms can be considered small. In the Paging *Third Report and Order*, we developed a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>73</sup> A "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.<sup>74</sup> The SBA has approved these small business size standards.<sup>75</sup> An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.<sup>76</sup> Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. Also, according to Commission data, 365 carriers reported that they were engaged in the provision of paging and messaging services.<sup>77</sup> Of those, we estimate that 360 are small, under the SBA-approved small business size standard.<sup>78</sup>

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<sup>67</sup> See "Lower 700 MHz Band Auction Closes," *Public Notice*, 17 FCC Rcd 17272 (WTB 2002).

<sup>68</sup> See "Lower 700 MHz Band Auction Closes," *Public Notice*, 18 FCC Rcd 11873 (WTB 2003).

<sup>69</sup> *Id.*

<sup>70</sup> 13 C.F.R. § 121.201, NAICS code 517211.

<sup>71</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 517211 (issued Nov. 2005).

<sup>72</sup> *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

<sup>73</sup> *Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068-70, paras. 291-295, 62 FR 16004 (Apr. 3, 1997).

<sup>74</sup> See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from A. Alvarez, Administrator, SBA (Dec. 2, 1998) (SBA Dec. 2, 1998 Letter).

<sup>75</sup> *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, paras. 98-107 (1999).

<sup>76</sup> *Id.* at 10085, para. 98.

<sup>77</sup> FCC Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3., page 5-5 (Feb. 2007). This source uses data that are current as of October 20, 2005.

<sup>78</sup> *Id.*

24. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction.<sup>79</sup> A “small business” is an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” is an entity with average gross revenues of \$15 million for each of the three preceding years. The SBA has approved these small business size standards.<sup>80</sup> The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as “very small business” entities, and one that qualified as a “small business” entity.

25. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services (PCS), and specialized mobile radio (SMR) telephony carriers. As noted earlier, the SBA has developed a small business size standard for “Cellular and Other Wireless Telecommunications” services.<sup>81</sup> Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.<sup>82</sup> According to Commission data, 432 carriers reported that they were engaged in the provision of wireless telephony.<sup>83</sup> We have estimated that 221 of these are small under the SBA small business size standard.

26. *Air-Ground Radiotelephone Service.* The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service.<sup>84</sup> We will use SBA’s small business size standard applicable to “Cellular and Other Wireless Telecommunications,” *i.e.*, an entity employing no more than 1,500 persons.<sup>85</sup> There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard.

27. *Aviation and Marine Radio Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category “Cellular and Other Telecommunications,” which is 1,500 or fewer employees.<sup>86</sup> Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875-157.4500 MHz (ship transmit) and 161.775-162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a “small” business as an entity that, together

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<sup>79</sup> Public Notice, “Auction of Wireless Communications Services, Auction Notes and Filing Requirements for 128 WCS Licenses Scheduled for April 15, 1997,” DA 97-386, Feb. 21, 1997.

<sup>80</sup> SBA Dec. 2, 1998 Letter.

<sup>81</sup> 13 C.F.R. § 121.201, NAICS code 517212.

<sup>82</sup> *Id.*

<sup>83</sup> FCC Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (Feb. 2007). This source uses data that are current as of October 20, 2005.

<sup>84</sup> The service is defined in section 22.99 of the Commission’s Rules, 47 C.F.R. § 22.99.

<sup>85</sup> 13 C.F.R. § 121.201, NAICS codes 517212.

<sup>86</sup> 13 C.F.R. § 121.201, NAICS code 517212.

with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$15 million dollars. In addition, a “very small” business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$3 million dollars.<sup>87</sup> There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as “small” businesses under the above special small business size standards.

28. Fixed Microwave Services. Fixed microwave services include common carrier,<sup>88</sup> private operational-fixed,<sup>89</sup> and broadcast auxiliary radio services.<sup>90</sup> At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category “Cellular and Other Telecommunications,” which is 1,500 or fewer employees.<sup>91</sup> The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA’s small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We noted, however, that the common carrier microwave fixed licensee category includes some large entities.

29. Offshore Radiotelephone Service. This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.<sup>92</sup> There are presently approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA’s small business size standard for “Cellular and Other Wireless Telecommunications” services.<sup>93</sup> Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.<sup>94</sup>

30. 39 GHz Service. The Commission created a special small business size standard for 39 GHz licenses – an entity that has average gross revenues of \$40 million or less in the three previous

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<sup>87</sup> *Amendment of the Commission’s Rules Concerning Maritime Communications*, PR Docket No. 92-257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

<sup>88</sup> See 47 C.F.R. §§ 101 *et seq.* (formerly, Part 21 of the Commission’s Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

<sup>89</sup> Persons eligible under parts 80 and 90 of the Commission’s Rules can use Private Operational-Fixed Microwave services. See 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee’s commercial, industrial, or safety operations.

<sup>90</sup> Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission’s rules. See 47 C.F.R. Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

<sup>91</sup> 13 C.F.R. § 121.201, NAICS code 517212.

<sup>92</sup> This service is governed by Subpart I of Part 22 of the Commission’s rules. See 47 C.F.R. §§ 22.1001-22.1037.

<sup>93</sup> 13 C.F.R. § 121.201, NAICS code 517212.

<sup>94</sup> *Id.*

calendar years.<sup>95</sup> An additional size standard for “very small business” is: an entity that, together with affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>96</sup> The SBA has approved these small business size standards.<sup>97</sup> The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and policies adopted herein.

31. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service comprises Multichannel Multipoint Distribution Service (MMDS) systems and Multipoint Distribution Service (MDS).<sup>98</sup> MMDS systems, often referred to as “wireless cable,” transmit video programming to subscribers using the microwave frequencies of MDS and Educational Broadband Service (formerly known as Instructional Television Fixed Service).<sup>99</sup> Wireless cable systems use 2 GHz band frequencies of the Broadband Radio Service (“BRS”), formerly Multipoint Distribution Service (“MDS”),<sup>100</sup> and the Educational Broadband Service (“EBS”), formerly Instructional Television Fixed Service (“ITFS”),<sup>101</sup> to transmit video programming and provide broadband services to residential subscribers.<sup>102</sup> These services were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services.<sup>103</sup> We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. Local Multipoint Distribution Service (“LMDS”) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.<sup>104</sup> As described below, the SBA small

<sup>95</sup> See *Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, ET Docket No. 95-183, Report and Order, 63 Fed. Reg. 6079 (Feb. 6, 1998).

<sup>96</sup> *Id.*

<sup>97</sup> See Letter to Kathleen O’Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998).

<sup>98</sup> *Amendment of Parts 1, 21, 73, 74, and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, WT Docket No. 03-66, RM-10586, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004).

<sup>99</sup> *See id.*

<sup>100</sup> MDS, also known as Multichannel Multipoint Distribution Service (“MMDS”), is regulated by Part 21 of the Commission’s rules; see 47 C.F.R. Part 21, subpart K; and has been renamed the Broadband Radio Service (BRS); see *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*; Part 1 of the Commission’s Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission’s Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico, 19 FCC Rcd 14165 (2004) (“*MDS/ITFS Order*”).

<sup>101</sup> ITFS systems are regulated by Part 74 of the Commission’s rules; see 47 C.F.R. Part 74, subpart I. ITFS, an educational service, has been renamed the Educational Broadband Service (EBS); see *MDS/ITFS Order*, 19 FCC Rcd 14165. ITFS licensees, however, are permitted to lease spectrum for MDS operation.

<sup>102</sup> See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report*, 20 FCC Rcd 2507, 2565 ¶ 131 (2006) (“*2006 Cable Competition Report*”).

<sup>103</sup> *Id.*

<sup>104</sup> See *Local Multipoint Distribution Service*, 12 FCC Rcd 12545 (1997).

business size standard for the broad census category of Cable and Other Program Distribution, which consists of such entities generating \$13.5 million or less in annual receipts, appears applicable to MDS, ITFS and LMDS.<sup>105</sup> Other standards also apply, as described.

32. The Commission has defined small MDS (now BRS) and LMDS entities in the context of Commission license auctions. In the 1996 MDS auction,<sup>106</sup> the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.<sup>107</sup> This definition of a small entity in the context of MDS auctions has been approved by the SBA.<sup>108</sup> In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities.<sup>109</sup> MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Cable and Other Program Distribution. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$13.5 million annually. Therefore, we estimate that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

33. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS).<sup>110</sup> We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, we estimate that at least 1,932 ITFS licensees are small entities.

34. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.<sup>111</sup> The auction of the 1,030 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>112</sup> An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>113</sup> The SBA has approved these small business

<sup>105</sup> 13 C.F.R. § 121.201, NAICS code 517510.

<sup>106</sup> MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996. (67 bidders won 493 licenses.)

<sup>107</sup> 47 C.F.R. § 21.961(b)(1).

<sup>108</sup> See *ITFS Order*, 10 FCC Rcd at 9589.

<sup>109</sup> 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standards for "other telecommunications" (annual receipts of \$13.5 million or less). See 13 C.F.R. § 121.201, NAICS code 517910.

<sup>110</sup> In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

<sup>111</sup> See *Local Multipoint Distribution Service*, Second Report and Order, 12 FCC Rcd 12545 (1997).

<sup>112</sup> *Id.*

<sup>113</sup> See *id.*

size standards in the context of LMDS auctions.<sup>114</sup> There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 winning bidders.

35. 218-219 MHz Service. The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (MSA) licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, the small business size standard was an entity that, together with its affiliates, has no more than a \$6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than \$2 million in annual profits each year for the previous two years.<sup>115</sup> In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we established a small business size standard for a “small business” as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed \$15 million for the preceding three years.<sup>116</sup> A “very small business” is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed \$3 million for the preceding three years.<sup>117</sup> Currently, no second auction is scheduled.

36. 24 GHz – Incumbent Licensees. This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of “Cellular and Other Wireless Telecommunications” companies. This category provides that such a company is small if it employs no more than 1,500 persons.<sup>118</sup> We believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent<sup>119</sup> and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

37. 24 GHz – Future Licensees. With respect to new applicants in the 24 GHz band, the small business size standard for “small business” is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of \$15 million.<sup>120</sup> “Very small business” in the 24 GHz band is an entity that, together with controlling interests and

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<sup>114</sup> See Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

<sup>115</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fourth Report and Order, 59 Fed. Reg. 24947 (May 13, 1994).

<sup>116</sup> *Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, Report and Order and Memorandum Opinion and Order, 64 Fed. Reg. 59656 (Nov. 3, 1999).

<sup>117</sup> *Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, Report and Order and Memorandum Opinion and Order, 64 Fed. Reg. 59656 (Nov. 3, 1999).

<sup>118</sup> 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

<sup>119</sup> Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

<sup>120</sup> *Amendments to Parts 1,2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz*, Report and Order, 15 FCC Rcd 16934, 16967 (2000); see also 47 C.F.R. § 101.538(a)(2).

affiliates, has average gross revenues not exceeding \$3 million for the preceding three years.<sup>121</sup> The SBA has approved these small business size standards.<sup>122</sup> These size standards will apply to the future auction, if held.

38. *Internet Service Providers.* The SBA has developed a small business size standard for Internet Service Providers (ISPs). ISPs “provide clients access to the Internet and generally provide related services such as web hosting, web page designing, and hardware or software consulting related to Internet connectivity.”<sup>123</sup> Under the SBA size standard, such a business is small if it has average annual receipts of \$23 million or less.<sup>124</sup> According to Census Bureau data for 2002, there were 2,529 firms in this category that operated for the entire year.<sup>125</sup> Of these, 2,437 firms had annual receipts of under \$10 million, and an additional 47 firms had receipts of between \$10 million and \$24,999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

39. *Part 15 Device Manufacturers.* The Commission has not developed a definition of small entities applicable to unlicensed communications devices manufacturers. Therefore, we will utilize the SBA definition applicable to Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.”<sup>126</sup> The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees.<sup>127</sup> According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year.<sup>128</sup> Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999.<sup>129</sup> Thus, under this size standard, the majority of firms can be considered

<sup>121</sup> *Amendments to Parts 1, 2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz*, Report and Order, 15 FCC Rcd 16934, 16967 (2000); see also 47 C.F.R. § 101.538(a)(1).

<sup>122</sup> See Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA (July 28, 2000).

<sup>123</sup> U.S. Census Bureau, “2002 NAICS Definitions: 518111 Internet Service Providers”; <http://www.census.gov/epcd/naics02/def/NDEF518.HTM>.

<sup>124</sup> 13 C.F.R. § 121.201, NAICS code 518111.

<sup>125</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 518111 (issued Nov. 2005).

<sup>126</sup> U.S. Census Bureau, 2002 NAICS Definitions, “334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing”; <http://www.census.gov/epcd/naics02/def/NDEF334.HTM#N3342>.

<sup>127</sup> 13 C.F.R. § 121.201, NAICS code 334220.

<sup>128</sup> U.S. Census Bureau, American FactFinder, 2002 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334220 (released May 26, 2005); <http://factfinder.census.gov>. The number of “establishments” is a less helpful indicator of small business prevalence in this context than would be the number of “firms” or “companies,” because the latter take into account the concept of common ownership or control. Any single physical location for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses. In this category, the Census breaks-out data for firms or companies only to give the total number of such entities for 2002, which was 929.

<sup>129</sup> *Id.* An additional 18 establishments had employment of 1,000 or more.

small.

40. *Telephone Apparatus Manufacturing.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing wire telephone and data communications equipment. These products may be standalone or board-level components of a larger system. Examples of products made by these establishments are central office switching equipment, cordless telephones (except cellular), PBX equipment, telephones, telephone answering machines, LAN modems, multi-user modems, and other data communications equipment, such as bridges, routers, and gateways.”<sup>130</sup> The SBA has developed a small business size standard for Telephone Apparatus Manufacturing, which is: all such firms having 1,000 or fewer employees.<sup>131</sup> According to Census Bureau data for 2002, there were a total of 518 establishments in this category that operated for the entire year.<sup>132</sup> Of this total, 511 had employment of under 1,000, and an additional 7 had employment of 1,000 to 2,499.<sup>133</sup> Thus, under this size standard, the majority of firms can be considered small.

41. *Other Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing communications equipment (except telephone apparatus, and radio and television broadcast, and wireless communications equipment).”<sup>134</sup> The SBA has developed a small business size standard for Other Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees.<sup>135</sup> According to Census Bureau data for 2002, there were a total of 503 establishments in this category that operated for the entire year.<sup>136</sup> Of this total, 493 had employment of under 500, and an additional 7 had employment of 500 to 999.<sup>137</sup> Thus, under this size standard, the majority of firms can be considered small.

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<sup>130</sup> U.S. Census Bureau, 2002 NAICS Definitions, “334210 Telephone Apparatus Manufacturing”; <http://www.census.gov/epcd/naics02/def/NDEF334.HTM#N3342>.

<sup>131</sup> 13 C.F.R. § 121.201, NAICS code 334210.

<sup>132</sup> U.S. Census Bureau, American FactFinder, 2002 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334210 (released May 26, 2005); <http://factfinder.census.gov>. The number of “establishments” is a less helpful indicator of small business prevalence in this context than would be the number of “firms” or “companies,” because the latter take into account the concept of common ownership or control. Any single physical location for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses. In this category, the Census breaks-out data for firms or companies only to give the total number of such entities for 2002, which was 450.

<sup>133</sup> *Id.* An additional 4 establishments had employment of 2,500 or more.

<sup>134</sup> U.S. Census Bureau, 2002 NAICS Definitions, “334290 Other Communications Equipment Manufacturing”; <http://www.census.gov/epcd/naics02/def/NDEF334.HTM#N3342>.

<sup>135</sup> 13 C.F.R. § 121.201, NAICS code 334290.

<sup>136</sup> U.S. Census Bureau, American FactFinder, 2002 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334290 (released May 26, 2005); <http://factfinder.census.gov>. The number of “establishments” is a less helpful indicator of small business prevalence in this context than would be the number of “firms” or “companies,” because the latter take into account the concept of common ownership or control. Any single physical location for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses. In this category, the Census breaks-out data for firms or companies only to give the total number of such entities for 2002, which was 471.

<sup>137</sup> *Id.* An additional 3 establishments had employment of 1,000 or more.



**D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities**

42. Should the Commission decide to extend the automatic roaming requirement to non-interconnected services or features, including services that have been classified as information services, such as broadband Internet access service, or other non-CMRS services, the only reporting or recordkeeping costs incurred will be administrative costs to ensure that an entity's practices are in compliance with the automatic rule. The compliance requirement is that carriers must provide automatic roaming to any requesting technologically compatible carrier outside of the requesting carrier's home market on reasonable and non-discriminatory terms and conditions.<sup>138</sup> We seek comment on the possible burden such requirements would place on small entities. Also, we seek comment on whether a special approach toward any possible compliance burden on small entities might be appropriate. Entities, especially small businesses, are encouraged to quantify the costs and benefits of any compliance requirement that may result from this proceeding.

**E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered**

43. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>139</sup>

44. The Commission's primary objective in this proceeding is to facilitate seamless wireless communications for consumers, even when they are outside of the coverage area of their own service providers. The *Further Notice* seeks to build on the decisions made in the *Report and Order*. In the *Report and Order*, the Commission clarifies that the automatic roaming is a common carrier obligation and adopts an automatic roaming rule that is applicable to services offered by CMRS carriers that are real-time, two-way switched voice or data services that are interconnected with the public switched network, and to push-to-talk and text messaging service.<sup>140</sup> Recognizing wireless subscribers' increasing reliance on mobile telephony services, especially the growing demand of data services by consumers, the *Further Notice* seeks comment on whether the Commission should extend the applicability of the automatic roaming requirements to non-interconnected services or features, including services that have been classified as information services, such as wireless broadband Internet access service, or other non-CMRS services.

45. To the extent that addressing the issue raised in the *Further Notice* requires modifying the applicability of the automatic roaming rules, we seek comment on the effect that such rule changes will have on small entities, on whether alternative rules should be adopted for small entities in particular, and on what effect such alternative rules would have on those entities. We invite comment on ways in which the Commission can achieve its goals while at the same time impose minimal burdens on small wireless service providers. Below, we summarize the issues raised in the *Further Notice*.

46. *Mobile Data Service Roaming.* The item seeks comment on whether the Commission

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<sup>138</sup> See *Further Notice of Proposed Rulemaking*, § 78.

<sup>139</sup> See 5 U.S.C. § 603(c).

<sup>140</sup> See *supra* ¶¶ 2, 65-67.

should extend whether we should extend automatic roaming obligations to non-interconnected services and features, including information services. To the extent that a covered carrier might be a small entity, we believe that extending the scope of automatic roaming obligation would be a benefit rather than a burden.

47. *Technical Issues.* The item also seeks comment on whether there are any special technical issues (or otherwise) associated with roaming among data networks that may not exist when roaming among CMRS carriers' interconnected voice networks. In the *Further Notice*, the Commission noted that it would be concerned if requiring a carrier to offer roaming service on its data network to the customers of other carriers resulted in the carrier facing capacity constraints that adversely affect its own customers. The *Further Notice*, therefore, asks whether a carrier should have the right to limit access to its network by roamers, and what parameters should be considered as justification for such limits.

48. *Jurisdiction over Information Service.* In the *Wireless Broadband Classification Order*,<sup>141</sup> the Commission determined that mobile wireless broadband Internet access service is an information service, and that it is not CMRS. If the Commission were to impose an automatic roaming on mobile wireless broadband Internet access service as proposed in the *Further Notice*, the jurisdictional issue should be considered regarding how could we treat the information service for roaming purpose. For example, could the Commission base the requirement on Title I ancillary jurisdiction, or on the Title III regulation of radio services? Alternatively, the *Further Notice* seeks comment on whether the Commission should restrict the automatic roaming mandate only to non-interconnected data services that are not classified as information services.

**F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules**

49. None.

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<sup>141</sup> See generally, *Wireless Broadband Internet Access Declaratory Ruling*, 22 FCC Rcd 5901.

**STATEMENT OF  
CHAIRMAN KEVIN J. MARTIN**

*Re: Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-26, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-143*

Consumers increasingly expect that their mobile phones will function where they work, where they play, and where they travel. Automatic roaming fulfills these expectations in a manner that is seamless and transparent to the consumer. Today's Report and Order will help ensure that all consumers including those living in rural areas receive this benefit.

The order adopted today, however, also recognizes that a reasonable roaming request does not include a request for roaming in areas where a provider already has access to spectrum. In this respect the Report and Order continues to support the overarching goal of encouraging facilities-based competition in the wireless market. It also does not impose a price cap or any other form of rate regulation.

While the Report and Order adopted today does not impose automatic roaming obligations on carriers' broadband data services, the Further Notice adopted today seeks additional comment on automatic roaming for broadband data. I am sympathetic to some of the concerns raised regarding access to data roaming. Some companies, however, have also suggested that part of their business model for the 700 MHz band includes wholesaling capacity to provide broadband roaming to other carriers as a kind of anchor service. I am concerned that extending the roaming obligation to broadband data services at this time could undermine the wholesale model that some have advocated.

I look forward to the further development of the record on these issues, and to working with my colleagues to address the questions raised.

**STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS  
APPROVING IN PART, CONCURRING IN PART**

*Re: Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-26, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-143*

Today's item is good news for consumers who want to be able to use their mobile phones as they travel across the United States. On three occasions over the past three decades, the FCC has declined to create an automatic roaming rule. The upshot is that—until today—small, rural wireless carriers have not enjoyed the common carrier protections of Title II when negotiating roaming agreements with other carriers, including large national ones. This is an important dollars and cents issue for consumers. After all, it is consumers who pay the price at the end of the day when their carriers accept inflated roaming rates or cannot reach a roaming agreement at all.

Today's decision affirms for the first time that carriers must deal with each other in good faith and without discrimination when it comes to negotiating roaming for voice service. We also include push-to-talk and text messaging, as well as data services that interconnect with the PSTN. This means Americans will be able to travel with greater confidence that they can place and receive calls while on the road. I appreciate the Chairman's leadership in bringing this pro-consumer item to us.

I concur in part, however, because I believe we should have taken another step forward today. Consumers rely upon their mobile handsets these days for a dizzying array of data services, going well beyond those we cover in today's item. Because the Commission chose—unwisely, in my view—to reclassify data services under Title I rather than Title II of the Communications Act, these services are for the most part *not* included in the protections created by today's Order.

Consider some of the immediate effects of our decision today:

- Roaming consumers will be able to send text messages to their friends' mobile phones—because we conclude today that text messaging is “typically offered” in conjunction with voice service. But these very same consumers have no guarantee that they can send emails to their friends—even though many consumers (including virtually all of us in this room) routinely use mobile devices to send and receive email.
- Roaming consumers will be able to make voice calls to PSTN numbers in the ordinary fashion. But it is not clear that they can rely on a VoIP application they may have downloaded to call PSTN numbers; and they have no guarantee whatsoever of being able to use a peer-to-peer VoIP product that dials IP addresses rather than PSTN numbers.
- Consumers who access the Internet by using their mobile device as a dial-up modem will be able to do so while roaming.<sup>142</sup> But consumers have no guarantee of being able to access the faster speeds offered by *non*-dial-up forms of wireless Internet access. And they have no guarantee of being able to use the many applications on their devices that rely on Internet access, such as browsers, mapping programs, interactive games, and so forth.

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<sup>142</sup> See, e.g., J.D. Biersdorfer, “Dial Up the Web with a Cellphone,” *New York Times* (July 12, 2007).

These are precisely the type of confusing, consumer-unfriendly results that led me to object to the Commission's reclassification of data services under Title I in the first place. Remember when we used to treat telephones as telephones and the telecommunications that enabled them as telecommunications services? That made for a lot less consumer confusion. Consumers should not have to be amateur engineers or telecom lawyers to figure out which mobile services they can expect to work when they travel. They should be able to assume that their phones will work to the fullest extent that technology permits, wherever they happen to be. And carriers should have the right to negotiate roaming agreements that secure just and reasonable prices for their own consumers.

I do appreciate my colleagues' willingness to address the issue of data roaming in a Further Notice of Proposed Rulemaking. I happen to think that the record we have before us right now is more than sufficient to support imposing an automatic data roaming rule today. Doing that would have provided some much-needed certainty to consumers and businesses alike, channeling technology development in a consumer-friendly way. But I do look forward to considering this issue in the weeks and months ahead, and I hope that we can reach a consensus that consumers should have the same roaming expectations in the future when it comes to data services that they have for voice services starting today.

Finally, my thanks to the Bureau which I know put a lot of hard work into this proceeding.

**STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN  
APPROVING IN PART, CONCURRING IN PART**

*Re: Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT  
Docket No. 05-26, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-143*

I am thrilled that we are at last tackling the long-simmering issue of roaming. While we do not resolve all of the key issues here today, particularly broadband roaming, this is a major step forward on an issue I have long believed deserves our attention. I have spoken often about my concern with the competitiveness of the commercial mobile radio service (CMRS) wholesale market and the Commission's need to reexamine our roaming obligations. So I am particularly pleased that after many fits and starts over the past several years, we finally are putting in place specific automatic roaming obligations on CMRS providers.

While some will say that this was a dispute between large and small carriers, I see this simply as a win for consumers. Our automatic roaming obligation will help all consumers have access to better coverage and service availability no matter where they live and where they travel. No customer should have to see the words "No Service" on their wireless device when there is a compatible network available.

Many argue that given the competitiveness of the CMRS retail marketplace, there is no need for Commission intervention. There are two flaws in that reasoning.

First, especially in light of the continuing consolidation in the market, just because a market is competitive doesn't mean we shouldn't take steps to ensure it remains that way. Nothing is more fundamental than interconnection to our mission, and roaming is in many ways how the wireless world interconnects.

Second, I have been increasingly concerned about the competitiveness of the CMRS wholesale market as compared to five years ago. Concerns about roaming have become more widespread and more vocal over the past several years. Whether in the context of recent mergers or other rulemakings, the Commission is hearing regularly from small and mid-size carriers who are becoming increasingly frustrated with their ability to negotiate automatic roaming agreements with larger regional and nationwide carriers for the full range of CMRS services. Not surprisingly, consolidation in the wireless industry over the past few years has only served to amplify existing concerns about the current state of roaming practices.

A critical distinction between the wholesale and retail market is that the network technology of a carrier interested in roaming even further limits the choice of potential roaming partners in a given market. For example, it is difficult for a carrier who employs GSM technology to roam on a CDMA network. It is like a vegetarian dining at a restaurant with four options on the menu, but only having the choice of the one that does not have meat. Just because there are four or five wireless options for consumers doesn't mean that carriers have that many choices about with whom they can choose to roam.

But while we place an important piece in clarifying that automatic roaming is subject to the common carrier provisions of Title II of the Act, including Sections 201 and 202, I remain concerned that we have not finished the puzzle by extending our automatic roaming requirement to all data services. Unfortunately, our rushed effort to reclassify broadband services as Title I services has taken the Commission outside the ambit of the core legal protections and grounding afforded by Congress in Title

II. While our proceeding should be an “automatic” opportunity to include broadband services under our roaming approach, we are now presented with some unnecessarily challenging questions to our new and unsettled legal and policy framework for broadband services.

As I warned earlier this year in our wireless broadband reclassification item, we must be careful in drawing an unnecessarily bright line between wireless broadband services and commercial mobile services and the regulatory protections that come with CMRS status. Indeed, our own item goes to great length to limit automatic roaming to services that are interconnected to the public-switched telephone network, but then turns around and (rightly) includes non-interconnected text messaging and push-to-talk services in the automatic roaming services.

Rather than look for ways to narrow the automatic roaming obligation, the public interest would be much better served if we were to consider how best to frame the roaming requirement to include broadband. With the stroke of a pen, the Commission could have taken the specific step of enhancing the experience of consumers who are interested in having access to high-speed wireless services wherever they travel. As we become an increasingly mobile and broadband society, we are missing a real opportunity to improve broadband availability for American consumers through an automatic data roaming obligation.

I am very pleased, however, of the willingness of Chairman Martin and my colleagues to include a Further Notice of Proposed Rulemaking on the issue of extending this roaming obligation to other non-interconnected services or features, including information services. It is critical that we address this issue in the near term. Consumers place great value on their ability to seamlessly access their wireless broadband services and it is our job here at the Commission to step in and ensure that consumers have access to both voice and data when they leave their home service area.

For all of these reasons, while I strongly support our decision to adopt a specific rule to ensure the continued development of automatic roaming services, I approve in part and concur in part to this Report and Order.

**STATEMENT OF  
COMMISSIONER DEBORAH TAYLOR TATE**

*Re: Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-26, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-143*

As a state commissioner, I often heard from small and rural providers about the problems they faced regarding roaming. I believe it is important for subscribers across the country, including those who live in rural areas, to have access to a robust communications network. In roaming, as with other rules, we can and should support small and rural providers and their customers in obtaining this access via wireless services. For example, just last week, we approved new rules for the 700 MHz Band that will make more spectrum available across small license areas for small and rural providers and encourage deployment of wireless service in rural areas.

Today's order recognizes that small and rural providers nonetheless find it hard to do business if their subscribers cannot be connected to larger, even nationwide, networks. The customers of these providers understandably want service when they travel outside of their provider's home network for school, work, or to access healthcare. There also may be benefits to public safety, or even homeland security, in having mobile subscribers connected at all times, even while they are outside their home networks. In addition, subscribers want roaming to work seamlessly, with what is called "automatic" roaming.

It is also worth noting that roaming is an important issue for carriers of all sizes and consumers in all places. For example, some providers have invested to build networks over large geographic areas, including building nationwide services. These large carriers want to receive reasonable compensation for the use of their networks, so they may continue to invest, maintain and upgrade their facilities to serve their subscribers, as well as other carriers' subscribers.

Today's item tries to strike a balance by clarifying that automatic roaming is a common carrier service and thus subject to protections outlined in Sections 201 and 202 of the Communications Act. I am reluctant to interfere with competitive market forces, and I am pleased that we decline to impose rate regulation on roaming fees. Small and rural carriers can be assured that, upon a reasonable request, other CMRS carriers will be required to provide them with automatic roaming services on a "just, reasonable, and non-discriminatory basis." Carriers that are likely to provide automatic roaming can be assured that the Commission will not be parsing the details of every roaming agreement.

Our rules also should encourage efficiency. Where providers have spectrum or access to it, they should build out their networks. Where they do not, we want to ensure that customers of these providers can roam on other networks. Today's item strikes the right balance by not establishing roaming as an obligation of a would-be provider for any market in which the requesting carrier already owns or leases spectrum usage rights.

Today's item also issues a Further Notice seeking comment on whether we should extend the automatic roaming obligation that we adopt today to non-interconnected services or features, including services such as wireless broadband Internet access. I hope that, in taking this step, we are not revisiting the issues we addressed only 138 days ago in the *Wireless Broadband Classification Order*, which found that wireless broadband Internet access is an information service.



**STATEMENT OF  
COMMISSIONER ROBERT M. McDOWELL**

*Re: Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-26, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-143*

I support today's narrowly-tailored action to codify wireless carrier obligations regarding automatic roaming. Today we are acting consistently with the Commission's general policy to allow competitive market forces, rather than regulations, to foster the development of wireless services, subject to the protections of Sections 201 and 202 of the Communications Act. For example, we are refraining from: imposing negotiation mandates; setting rates; creating a new class of wireless carriers; and initiating an investigation of roaming practices. Our light regulatory approach will benefit wireless consumers because we are allowing the industry to fulfill consumer expectations of anytime, anywhere communications through seamless roaming arrangements.

Given that the market for non-interconnected services provided over advanced broadband networks is still developing, it is appropriate that we are seeking additional comment on the implications of extending the automatic roaming requirement to these services. Although it is possible that unrestricted data roaming obligations may benefit consumers by providing a wider availability for the data features they increasingly rely upon, it is equally important that the Commission not inhibit innovation and investment by distorting incentives to differentiate products. I recognize and appreciate the complicated legal and economic factors involved, and I look forward to hearing from interested stakeholders on this aspect of the market. In the meantime, I strongly urge the private sector to work together to forge solutions for the benefit of all wireless consumers.

Thank you to the staff of the Wireless Bureau, my colleagues, and especially Chairman Martin.