DISSENTING STATEMENT OF
COMMISSIONER MEREDITH ATTWELL BAKER

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

I understand the importance of data roaming; but, I cannot support this Order for a fundamental reason: in imposing these data roaming obligations on mobile broadband services, we exceed our authority and impose rules of common carriage that are impermissible under our statute. Section 332(c)(2) of the Communications Act states in no uncertain terms that "a private mobile service [like data roaming] shall not . . . be treated as a common carrier for any purpose under this Act."[1]

This treatment differs fundamentally from voice roaming services that are commercial mobile services long subject to Title II common carrier obligations. Thus, the imposition of the common carrier requirements of sections 201 and 202 on voice roaming negotiations elicited not a single dissenting statement from the Commission— neither in 2007, nor in 2010 when we revisited voice roaming.[2] Yet here, we seek to extend those same types of requirements from voice to data under a very different legal analysis because of the clear statutory limits on this agency.

The Order, and much of the rhetoric that has developed around it, distinguishes data from voice roaming on a carrier's ability to negotiate individualized agreements. There is, however, no distinction here between voice and data roaming. That a deal is individually negotiated is not dispositive as to whether or not it is a common carrier offering. This fact is most clearly demonstrated by our prior findings that voice roaming is a common carrier offering although voice roaming deals are currently individually negotiated under common carriage rules.[3] Indeed,

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[1] 47 U.S.C. § 332(c)(2) (2006). Congress defined "private mobile service" as "any mobile service . . . that is *not* a commercial mobile service or the functional equivalent." *Id.* § 332(d)(3) (emphasis added). Section 332(d)(1) clearly establishes commercial mobile service as "any mobile service" that is provided for profit and makes service interconnected with the public switched network available. *Id.* § 332(d)(1), (d)(2). And, in 2007, the Commission unanimously found that wireless mobile broadband service [data roaming] is not a commercial mobile service because it is not an "'interconnected service' as defined in the Act and the Commission's rules." *See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, 5916 ¶ 42 (2007). In addition, where the host provider enables data roaming as an information service to the subscriber, section 153(51) is yet another bar to common carrier regulation. Section 153(51) provides that "a telecommunications carrier shall be treated as a common carrier…only to the extent that it is engaged in providing telecommunications services. 47 U.S.C. § 153 (51). The Order so much as concedes this, asserting that data roaming is not a common carrier requirement in an attempt to avoid the Act's clear prohibitions.

[2] *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Order on Reconsideration and Further Notice of Proposed Rulemaking, WT Docket No. 05-265, 25 FCC Rcd 4181 (2010); *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers,* Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 05-265, 22 FCC Rcd 15817 (2007).

[3] *See Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003) (agreeing with the Commission's conclusion that the legality of Verizon's individualized sales concessions practice did not depend on the company's designation as a common carrier, but rather on whether the practice was unjust or unreasonable); *see also Iowa Telecomms. Servs. v. Iowa Utils. Bd.*, 563 F.3d 743, 750 (8th Cir. 2009) (affirming the district court's order and agreeing with the Iowa Utilities Board finding that Sprint's individually negotiated, private contracts did not outweigh the evidence that Sprint was acting as a telecommunications carrier). *See generally Ex Parte* Letter from John T. Scott, III, Vice

the fact that voice roaming agreements are individually negotiated under our rules today underscores that individualized negotiations are *not* the touchstone of common carrier status.

The *NARUC* standard for determining common carriage is straightforward: whether a carrier is free to decide "whether and on what terms to deal."[4] We mandate today that a wireless provider must enter into a data roaming deal (the whether) and the terms of the deal (the what). These are Title II common carrier requirements that are not permitted under Section 332(c). [5]

Relevant precedent makes clear that the character of regulatory obligations determines whether they constitute common carrier treatment, not the words used to describe them or the purported source of authority.[6] While the Order substitutes a new standard—"commercially reasonable" for Title II's "just and reasonable" and "not unreasonably discriminatory" as a measure to assess terms and conditions—and a new source of authority—Title III—the character of the obligations is the same.[7] The obligations fundamentally track the obligations the previously Commission imposed under sections 201 and 202. As if to underscore the point, the dispute resolution factors of the Order are built upon the provisions in last year's *Order on Reconsideration* confirming roaming obligations on voice services under Title II.[8] What is worse, the structure we create today creates perverse incentives for parties seeking mandated roaming agreements. There will now be a real risk of a revolving door as parties file repeated complaints attempting to get the lowest mandated rate. This type of gamesmanship should not be permitted as it will undermine the commercial process and create a non-trivial burden on Commission resources.

I agree that consumers expect the ability to access their voice and data services nationally. On the record before us, most consumers have that ability today. National, regional, and new entrants all advertise prominently on their websites nationwide data availability.[9] Many of those

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President & Deputy Gen. Counsel, Regulatory Law, Verizon Wireless, to Marlene H. Dortch, Sec'y, FCC, WT Docket No. 05-265, at 7 (Mar. 30, 2011).

[4] *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC (NARUC I)*, 525 F.2d 630, 642 (D.C. Cir. 1976) (stating it is not common carriage if "there is [any] indication in the proposed regulations that [providers] are to be in any way compelled to serve any particular applicant, or that their discretion in determining whom, and on what terms, to serve, is to be in any way limited").

[5] 47 U.S.C. § 332(c).

[6] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 702 (1979); *NARUC I*, 525 F.2d at 644 ("A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.").

[7] It is noteworthy that courts have held that an element of commercial reasonability is the ability to walk away from negotiations. *See, e.g.*, *Centennial P.R. License Corp. v. Telecomms. Regulatory Bd*, No. 10-1091, 2011 U.S. App. LEXIS 2341, at **46-47 (1st Cir. Feb. 7, 2011) (holding that "commercially reasonable efforts" do not require a wireless carrier to reach an interconnection arrangement with "all suitors" when there is a "business, technology or efficiency ground" justification for not reaching an agreement); *W. Tex. Transmission, L.P. v. Enron Corp.*, 907 F.2d 1554, 1563-64 (5th Cir. 1990) ("Whether a specific condition is [commercially] reasonable must be determined by examining the circumstances of a particular case.") (citation omitted). The Order removes that option by giving the Commission the option of imposing the terms and conditions of the best and final offer of a party requesting roaming.

[8] *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 25 FCC Rcd at 4182 ¶ 2, 4200-01 ¶¶ 37-40 (reiterating that automatic voice roaming is a common carrier obligation for CMRS carriers and that roaming disputes would be resolved taking into account eleven non-exclusive factors to determine whether a CMRS provider's response to a particular request for automatic roaming was reasonable).

[9] *See, e.g.*, Sprint – Nationwide Coverage, http://coverage.sprint.com/IMPACT.jsp?mapzip=&covType=sprint&returnUrl=http%3A%2F%2Fshop2.sprint.com

most actively seeking regulatory intervention have nationwide 3G data roaming arrangements in place. Overall, our record shows that there are not generalized or categorical refusals to deal by wireless providers. Instead, there is a fundamental inability to agree on financial terms and conditions, primarily rates. This is a compelling difference to me. It raises not only the issue of whether the Commission is best equipped to determine a "commercially reasonable" market rate, but also is an area that Congress has specifically told the Commission to avoid.

With respect to the rates, I hope that our implementation of this Order will not result in mandated rates that are so low as to adversely affect the incentives of any carriers to invest in facilities-based services. We all share a collective goal of nationwide 4G coverage, and we must seek to defend that goal in our approach to data roaming complaints. Regulator-sanctioned roaming rates could well create disincentives for host carriers to build the next tower and would create similar disincentives for roaming carriers to invest and expand their own networks.

This is particularly true with respect to 4G services. The 4G rollout is ongoing; carriers are investing billions in their next-generation networks, which bring a host of additional technical and technological challenges. A more prudent course would have been to limit the reach of this decision to allow 4G deployment to proceed, and for carriers to understand the challenges and opportunities of those new networks prior to the government mandating access.

While I do not vote for this Order, I nonetheless call on all parties, both those requesting roaming and host networks, to treat each request for data roaming services seriously and in good faith. With or without the "regulatory backstop" envisioned in this Order, it is ultimately incumbent upon our nation's mobile carriers to work together to develop the data roaming environment that meets the needs and expectations of each of us as we increasingly come to rely upon mobile data for all our communication needs.

I respectfully dissent. Nonetheless, I would like to thank everyone in the Commission who participated in this long endeavor. I appreciate your hard and dedication.

%2FNASApp%2Fonlinestore%2Fen%2FAction%2FDisplayPhones%3FINTNAV%3DLEG%3AHE%3APhones&language=EN (last visited Apr. 6, 2011); T-Mobile - Personal Coverage Check, http://www.t-mobile.com/coverage/pcc.aspx (last visited Apr. 6, 2011); MetroPCS – Coverage, http://www.metropcs.com/coverage/ (last visited Apr. 6, 2011); U.S. Cellular Voice and Data Maps, http://www.uscellular.com/coverage-map/voice-and-data-maps.html (last visited Apr. 6, 2011); Cricket – Broadband Coverage Maps, http://www.mycricket.com/coverage/maps/broadband?z=4&clat=37.02009820136811&clng=-98.173828125&addr=&city=&state=&zip=&persist=1 (last visited Apr. 6, 2011); Cincinnati Bell Cincinnati – Wireless Coverage Map, http://www.cincinnatibell.com/consumer/wireless/coverage/ (last visited Apr. 6, 2011).