

ORAL ARGUMENT NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Case No. 11-1135 (consolidated with No. 11-1136)

CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS,
Appellant-Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee-Respondent.

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

**JOINT BRIEF FOR INTERVENORS IN SUPPORT OF
THE FEDERAL COMMUNICATIONS COMMISSION**

Richard P. Bress
James H. Barker
Matthew A. Brill
Alexander Maltas
LATHAM & WATKINS LLP
555 11th St. NW, Suite 1000
Washington, DC 20004
(202) 637-2200
*Counsel for Leap Wireless International, Inc.
and Cricket Communications, Inc.*

January 23, 2012

Additional counsel listed on next page

Daniel L. Brenner
Jessica L. Ellsworth
Hogan Lovells US LLP
555 13th Street, NW
Washington, DC 20004-1109
(202) 637-5600
Counsel for Bright House Networks

Carl W. Northrop
Michael L. Lazarus
Telecommunications Law Professionals
PLLC
875 15th Street, NW, Suite 750
Washington, DC 20005-2400
(202)789-3120
*Counsel for MetroPCS
Communications, Inc.*

Matthew A. Brill
James H. Barker
Alexander Maltas
LATHAM & WATKINS LLP
555 11th St. NW, Suite 1000
Washington, DC 20004
(202) 637-2200
*Counsel for RCA – the Competitive
Carriers Association*

Caressa D. Bennet
Michael R. Bennet
Bennet & Bennet, PLLC
4350 East West Highway, Suite 201
Bethesda, MD 20814-4492
(202)371-1500
*Counsel for Rural Telecommunications
Group, Inc.*

Peter M. Connolly
Holland & Knight LLP
2099 Pennsylvania Avenue, NW
Suite 100
Washington, DC 20006-6801
(202)955-3000
Counsel for U.S. Cellular Corp.

Jill Canfield
National Telecommunications
Cooperative Association
4121 Wilson Boulevard, Suite 1000
Arlington, VA 22203-0000
(703)351-2000
Counsel for NTCA

Douglas E. Hart
Attorney at Law
441 Vine Street
Suite 4192
Cincinnati, OH 45202
(513)621-6709
Counsel for Cincinnati Bell Wireless

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I certify the following pursuant to DC Circuit Rule 28(a)(1):

A. Parties and Amici

All parties, intervenors, and amici appearing before the Federal Communications Commission and in this Court are listed in the Opening Brief For Appellant Cellco Partnership d/b/a Verizon Wireless.

B. Ruling Under Review

The ruling under review is an order of the Federal Communications Commission captioned *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd. 5411 (2011) (JA ___ - ___).

C. Related Cases

This Court consolidated the case captioned *Cellco Partnership v. FCC*, No. 11-1135 (D.C. Cir. filed May 13, 2011), with the case captioned *Cellco Partnership v. FCC*, No. 11-1136 (D.C. Cir. filed May 13, 2011). These cases have not previously been before this Court. Intervenors are not aware of any other related case.

/s/ Richard P. Bress

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of this Court, Intervenors state as follows:

Bright House Networks, LLC (“BHN”) is not a publicly held corporation or other publicly held entity. BHN is owned 100% by Time Warner Entertainment – Advance/Newhouse Partnership (“TWEAN”). The general partners of TWEAN are Time Warner Entertainment Company, L.P., Time Warner NY Cable LLC and Advance/Newhouse Partnership. There is no publicly held corporation that owns 10% or more of BHN’s stock.

Cincinnati Bell Wireless, LLC is a limited liability company formed under the laws of the State of Ohio. The parent company of Cincinnati Bell Wireless, LLC’s sole member is Cincinnati Bell Inc., which is a publicly-held corporation.

Leap Wireless International, Inc. is a corporation whose shares are publicly traded on the NASDAQ Global Select Market. To Leap’s knowledge, no publicly-held corporation owns 10% or more of Leap’s stock. Cricket Communications, Inc. is a wholly-owned subsidiary of Leap and is not publicly traded.

MetroPCS Communications, Inc. is a publicly-traded company listed on the New York Stock Exchange that is organized to provide wireless and data services to its customers. MetroPCS has no parent corporation and to MetroPCS’ knowledge no publicly held company holds more than 10 percent of its stock.

The National Telecommunications Cooperative Association (“NTCA”) is a not-for-profit trade association of common carriers providing telecommunications services to subscribers and interexchange carriers throughout rural America. These companies are full members of NTCA. NTCA also has international members who provide telecommunications services and associate members, including consultants, and others with interests in telecommunications. NTCA has not issued shares or debt securities to the public. NTCA does not have any parent companies, subsidiaries or affiliates that have issued shares or debt securities.

RCA – the Competitive Carriers Association (“RCA”) has no parent company. No publicly held company has a 10 percent or greater ownership interest in RCA. RCA is an association representing the interests of nearly 100 wireless telecommunications providers, including many rural, small, and mid-sized carriers, that offer services to subscribers throughout the nation. Most of RCA’s members serve fewer than 500,000 customers.

The Rural Telecommunications Group, Inc. (“RTG”) is a Section 501(c)(6) trade association dedicated to promoting wireless opportunities for rural telecommunications companies through advocacy and education. RTG’s members are small businesses serving or seeking to serve secondary, tertiary and rural markets. RTG’s members are comprised of both independent wireless carriers and wireless carriers that are affiliated with rural telephone companies. RTG is a

corporation and no publicly-held company has a 10% or greater ownership in RTG.

United States Cellular Corporation (“USCC”), is a publicly traded for profit corporation organized under the laws of the State of Delaware. USCC is majority owned by Telephone and Data Systems Inc. (“TDS”), also a publicly traded for profit corporation organized under the laws of the State of Delaware.

TABLE OF CONTENTS

	Page
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	vii
GLOSSARY	xiii
STATUTES AND REGULATIONS	1
INTRODUCTION	1
STATEMENT OF THE CASE.....	2
A. The FCC’s Recognition of the Need for Automatic Roaming Requirements.....	3
B. Increasing Consolidation in the Wireless Industry	5
C. The FCC’s Response to the Data Roaming Problem.....	7
D. The Increasing Convergence of Common Carrier and Private Carrier Regulation	11
SUMMARY OF ARGUMENT	17
ARGUMENT	20
I. SECTION 332 OF THE TELECOMMUNICATIONS ACT DOES NOT BAR THE FCC’S ACTIONS	20
A. The FCC’s Application of Section 332 is Entitled to Substantial Deference.....	21
B. The FCC Reasonably Concluded That the Order Does Not Establish Common Carrier Obligations	24
1. The <i>Order</i> Does Not Require Indiscriminate Service or Other Traditional Attributes of Common Carriage.	24

	Page
2. The <i>Data Roaming Rule</i> Is Distinguishable from the Rules at Issue in <i>Midwest Video II</i>	29
3. The <i>Order</i> Fits Comfortably Within the Parameters of Cases Upholding FCC Regulations of Private Carriers.....	31
4. The FCC Reasonably Concluded that the <i>Order</i> Does Not Conflict With Its Prior Orders	33
II. THE DATA ROAMING RULE DOES NOT AMOUNT TO AN UNCONSTITUTIONAL TAKING	35
III. IF THE COURT GRANTS THE PETITION, THE APPROPRIATE REMEDY IS REMAND	37
CONCLUSION.....	38

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Associated Gas Distributors v. FERC</i> , 824 F.2d 981 (D.C. Cir. 1987).....	15
<i>Bell Atlantic Telephone Companies v. FCC</i> , 24 F.3d 1441 (D.C. Cir. 1994).....	36
<i>BellSouth Corp. v. FCC</i> , 162 F.3d 1215 (D.C. Cir. 1999).....	17
<i>Cablevision System Corp. v. FCC</i> , 597 F.3d 1306 (D.C. Cir. 2010).....	14
<i>Computer & Communications Industry Association v. FCC</i> , 693 F.2d 198 (D.C. Cir. 1982).....	25
<i>Duquesne Light Co. v. Barasch</i> , 488 U.S. 299 (1989).....	37
<i>FCC v. Florida Power Corp.</i> , 480 U.S. 245 (1987).....	37
<i>FCC v. Midwest Video Corp.</i> , 440 U.S. 689 (1979).....	29, 30, 31, 32
<i>Federal Power Commission v. Hope Natural Gas Co.</i> , 320 U.S. 591 (1944).....	37
<i>Iowa Telecommunications Services, Inc. v. Iowa Utilities Board</i> , 563 F.3d 743 (8th Cir. 2009).....	22, 23, 26
<i>MCI Telecommunications Corp. v. FCC</i> , 59 F.3d 1407 (D.C. Cir. 1995).....	27

* Authorities upon which we chiefly rely are marked with asterisks.

	Page(s)
<i>MCI Telecommunications Corp. v. FCC</i> , 675 F.2d 408 (D.C. Cir. 1982).....	27
<i>Munn v. Illinois</i> , 94 U.S. (4 Otto) 113 (1877).....	12
* <i>National Association of Regulatory Utility Commissioners v. FCC</i> , 525 F.2d 630 (D.C. Cir. 1976).....	12, 22, 23, 24, 34
<i>National Cable & Telecommunications Association v. Brand X Internet Services</i> , 545 U.S. 967 (2005).....	21
<i>National Mining Association v. Kempthorne</i> , 512 F.3d 702 (D.C. Cir. 2008).....	36
<i>NetCoalition v. SEC</i> , 615 F.3d 525 (D.C. Cir. 2010).....	28
<i>New York, New Haven & Hartford Railroad Co. v. Interstate Commerce Commission</i> , 200 U.S. 361 (1906).....	27
<i>Nuvio Corp. v. FCC</i> , 473 F.3d 302 (D.C. Cir. 2006).....	14
* <i>Orloff v. FCC</i> , 352 F.3d 415 (D.C. Cir. 2003).....	13, 22, 27, 28
<i>Semon v. Royal Indemnity Co.</i> , 279 F.2d 737 (5th Cir. 1960).....	13
<i>Southern Co. Services v. FCC</i> , 313 F.3d 574 (D.C. Cir. 2002).....	37
* <i>Southwestern Bell Telephone Co. v. FCC</i> , 19 F.3d 1475 (D.C. Cir. 1994).....	13, 21, 22, 23, 24

	Page(s)
<i>Sprint Corp. v. FCC</i> , 331 F.3d 952 (D.C. Cir. 2003).....	29
<i>Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.</i> , 204 U.S. 426 (1907).....	27
<i>United States v. Eurodif S.A.</i> , 555 U.S. 305 (2009).....	21
* <i>United States v. Midwest Video Corp.</i> , 406 U.S. 649 (1972).....	32
<i>United States v. Riverside Bayview Homes</i> , 474 U.S. 121 (1985).....	36
<i>United States v. Southwestern Cable Co.</i> , 392 U.S. 157 (1968).....	31, 32
<i>Verizon California, Inc. v. FCC</i> , 555 F.3d 270 (D.C. Cir. 2009).....	13, 23
* <i>Verizon Communications Inc. v. FCC</i> , 535 U.S. 467 (2002).....	27, 28, 37
* <i>Virgin Islands Telephone Corp. v. FCC</i> , 198 F.3d 921 (D.C. Cir. 1999).....	15, 22, 23, 26
<i>Vonage Holdings Corp. v. FCC</i> , 489 F.3d 1232 (D.C. Cir. 2007).....	14

ADMINISTRATIVE MATERIALS

<i>An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, etc.</i> , Report and Order, 86 FCC 2d 469 (1981)	3
---	---

Page(s)

Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fifteenth Report, 26 FCC Rcd. 9664 (2011).....6

Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fourteenth Report, 25 FCC Rcd. 11407 (2010).....6

Application of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, Staff Analysis and Findings, WT Docket No. 11-65 (rel. Nov. 29, 2011)6

Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services, Notice of Proposed Rulemaking, 15 FCC Rcd. 21628 (2000).....4

Framework for Broadband Internet Service, Notice of Inquiry, 25 FCC Rcd. 7866 (2010).....20

IP-Enabled Services, Report and Order, 24 FCC Rcd. 6039 (2009).....14

Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd. 1411 (1994).....13

Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, First Report and Order, 11 FCC Rcd. 18455 (1996).....4

Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd. 16340 (1999).....15, 16

Page(s)

Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, Third Report and Order and Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd. 15975 (2000).....16

Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, Second Report and Order, 26 FCC Rcd. 5411 (2011)..... 1, 7, 8, 9, 10, 11, 22, 24, 25, 27, 29, 30, 34, 37

Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 15817 (2007).....4, 5, 33, 34

Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 25 FCC Rcd. 4181 (2010).....5

Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements, First Report and Order, 25 FCC Rcd. 746 (2010).....14

Time Warner Cable Request for Declaratory Ruling, Memorandum Opinion and Order, 22 FCC Rcd. 3513 (2007).....20

Year 2000 Biennial 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, Order on Reconsideration, 19 FCC Rcd. 3239 (2004).....3

Page(s)

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution Amendment V36

47 U.S.C. §201(b)27

47 U.S.C. §303(b)17, 35

47 U.S.C. §303(d)(3).....37

47 U.S.C. §332(d)(1).....13, 16

47 U.S.C. §332(d)(2).....13

47 U.S.C. §332(d)(3).....16

47 U.S.C. §541(c)15

OTHER AUTHORITY

U.S. Government Accountability Office, GAO-10-779,
*Telecommunications: Enhanced Data Collection Could Help FCC
 Better Monitor Competition in the Wireless Industry* (2010), available
 at <http://www.gao.gov/new.items/d10779.pdf>6

GLOSSARY

<i>15th Wireless Competition Report</i>	<i>Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fifteenth Report, 26 FCC Rcd. 9664 (2011)</i>
<i>14th Wireless Competition Report</i>	<i>Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fourteenth Report, 25 FCC Rcd. 11407 (2010)</i>
Act	The Communications Act of 1934, as Amended
Br.	Brief
CMRS	Commercial mobile radio service
FCC	Federal Communications Commission
<i>Order</i>	<i>Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, Second Report and Order, 26 FCC Rcd. 5411 (2011)</i>
Verizon	Cellco Partnership d/b/a Verizon Wireless
<i>Voice Roaming Order</i>	<i>Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 15817 (2007)</i>
VoIP	Voice over Internet Protocol

STATUTES AND REGULATIONS

The applicable statutes and regulations are contained in the Brief for the Federal Communications Commission.

INTRODUCTION

Intervenors are competitive wireless communications carriers, including rural carriers, that support the Federal Communications Commission's ("FCC") order captioned *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd. 5411 (2011) ("*Order*") (JA ___ - ___).

Virtually the entire wireless industry—that is, every carrier but Verizon and AT&T—strongly supports the *Order*, as do leading consumer groups and other public interest organizations. The isolated opposition of Verizon and AT&T is not surprising, given that the *Order* arose in response to their dominant positions and their exercise of market power to deny rural, small, and mid-sized carriers access to data roaming services that are essential to competition.

With the emergence of smart-phone and tablet technology, consumers increasingly are using their mobile devices not only to make calls, but also to send emails, browse the Internet, and use Facebook and Twitter, etc. They now expect and demand seamless wireless coverage for all of their services wherever they are located, including when they travel. The FCC, accordingly, has correctly found

that voice and short text messaging services are critical to a competitive market, and mandated that carriers provide these services. Just like voice and text messaging roaming agreements, data roaming agreements enable customers of one carrier to use another carrier's network when traveling outside of their home coverage areas. Data roaming is a critical input for rural, small, and mid-sized wireless carriers. Without data roaming they cannot compete effectively against their largest rivals. But access to data roaming increasingly has been controlled—and limited—by Verizon and AT&T. The *Order* represents an effort by the FCC to prevent the harms to competition and to consumers that arise from the two dominant competitors' demonstrated ability to foreclose rivals by blocking their access to data roaming.

For the reasons discussed below and in the briefs of the FCC and MetroPCS, the *Order* is squarely within the FCC's statutory authority and does not impermissibly treat roaming providers as common carriers.

STATEMENT OF THE CASE

The FCC's adoption of its data roaming requirements reflects the agency's longstanding commitment to using its authority under Title III of the Communications Act of 1934, as amended (the "Act"), to ensure seamless

connectivity across different wireless communications networks.¹ To that end, the FCC has imposed public interest obligations under Title III on “common carriers” and “private carriers” alike, regardless of whether the services offered qualified as “telecommunications services” or “information services” under the Act.

A. The FCC’s Recognition of the Need for Automatic Roaming Requirements

The FCC has long mandated roaming as a key feature of its regulation of mobile wireless services pursuant to Title III. In the early 1980s, the FCC adopted the analog “AMPS” compatibility standard for cellular systems under its Title III authority “to enable subscribers of one cellular system to use their existing terminal equipment (*i.e.*, mobile handset) in a cellular market in a different part of the country (roaming).”² The FCC in the mid-1990s implemented wireless resale

¹ MetroPCS is filing a separate brief pertaining to the affirmative jurisdictional authority of the FCC to adopt the *Order*, and does not join in such discussion in this brief except as it pertains to Section 303(b) of the Act.

² *Year 2000 Biennial 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*, Order on Reconsideration, 19 FCC Rcd. 3239, 3241-42 ¶8 (2004); *see also An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, etc.*, Report and Order, 86 FCC 2d 469, 503-04 ¶¶80-81 (1981).

obligations to promote similar objectives.³ It later imposed manual roaming obligations on most wireless providers, finding that ubiquitous roaming was “important to the development of a seamless, nationwide ‘network of networks,’” and that it had the “authority to impose a roaming requirement in the public interest pursuant to [its] licensing authority under Sections 303(r) and 309 of the Communications Act.”⁴ The FCC again relied on Title III when imposing automatic voice roaming obligations in 2007.⁵

In its 2007 *Voice Roaming Order*, the FCC identified a significant problem impacting the wireless communications industry, namely, the inability of rural, small, and mid-sized carriers to obtain roaming arrangements that they need in order to compete with larger carriers. The FCC chose to address that concern in the voice services marketplace by classifying voice roaming as a wholesale “telecommunications service” and imposing traditional common carrier obligations, including the duty to provide roaming at “just and reasonable” and

³ See *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, First Report and Order, 11 FCC Rcd. 18455, 18459 ¶7 (1996).

⁴ *Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services*, Notice of Proposed Rulemaking, 15 FCC Rcd. 21628, 21630 ¶5, 21634 ¶15 (2000).

⁵ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 15817, 15828, ¶28 (2007) (“*Voice Roaming Order*”).

“non-discriminatory” rates, terms, and conditions. *Voice Roaming Order* ¶¶1, 37. The FCC further adopted a presumption favoring roaming wherever networks are technologically compatible, thus strengthening the rights of smaller carriers that depend on roaming. *Id.* ¶33.

The FCC limited those common carrier obligations to voice roaming, *id.* ¶5, but it also recognized that the increasing convergence of voice and data services warranted additional consideration of a possible data roaming requirement. The FCC accordingly sought comment on whether to impose further roaming requirements with respect to “non-interconnected services or features, including services that have been classified as information services.” *Voice Roaming Order* ¶77. The FCC later sought additional comment on the need for a data roaming rule to supplement the record in 2010. *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 25 FCC Rcd. 4181(2010) (“*Second FNPRM*”).

B. Increasing Consolidation in the Wireless Industry

At the same time the FCC was considering a data roaming requirement, the wireless industry was becoming increasingly concentrated. The FCC has found in its most recent annual Wireless Competition Reports that the wireless industry is highly concentrated and that such concentration has increased markedly in recent

years. See, e.g., *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fifteenth Report, 26 FCC Rcd. 9664, 9687 ¶4 (2011) (“*15th Wireless Competition Report*”). The GAO likewise has noted that the “primary change in the wireless industry” over the last decade is “industry consolidation,” and that, from 2006 to 2009, AT&T and Verizon increased their subscriber market share by nearly 20 percent. U.S. Gov’t Accountability Office, GAO-10-779, *Telecommunications: Enhanced Data Collection Could Help FCC Better Monitor Competition in the Wireless Industry*, at 10, 13 (2010), available at <http://www.gao.gov/new.items/d10779.pdf>.

As a result of these developments, the FCC *for the first time* was unable to certify in 2010 that the wireless industry was characterized by “effective competition,” *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, 25 FCC Rcd. 11407, 11435 ¶16 (2010) (“*14th Wireless Competition Report*”), and it was unable to make that certification again in 2011, *see 15th Wireless Competition Report*, at 9691 ¶14. Moreover, a recent FCC staff analysis issued in connection with AT&T’s now-abandoned proposal to acquire T-Mobile observed that Verizon and AT&T each accounted for over 30 percent of total subscribers and industry revenue by the end of 2010, and together accounted for an astounding 80 percent of industry EBITDA. *Application of AT&T Inc. and*

Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, Staff Analysis and Findings, WT Docket No. 11-65, ¶37 (rel. Nov. 29, 2011).

Whereas all carriers (including so-called “nationwide” carriers) once required roaming to fill coverage gaps, making roaming agreements between larger and smaller providers mutually beneficial, the recent spate of acquisitions by Verizon and AT&T has turned them into super-carriers with scant need to roam on other providers’ networks.

C. The FCC’s Response to the Data Roaming Problem

In the order on review, the FCC responded to the record developed in response to the *Voice Roaming Order* and *Second FNPRM* by adopting a narrow and tailored response to the marketplace conditions it identified.

The FCC found that wireless data services are becoming “an increasingly significant part of the lives of American consumers.” *Order* ¶14 (JA___). Data traffic has risen sharply in recent years, *id.*, and consumers increasingly are using their phones and devices not only to make calls, but also to send emails, browse the Internet, use Facebook, etc., as their preferred means of communications. These services typically are bundled together and customers expect to receive them wherever they are located. The FCC further found that consumers now demand and expect seamless nationwide coverage of all of their wireless services,

including data services, wherever they are located, including when they travel. *Id.* ¶15 (JA___).

Because of these consumer expectations, “a service provider’s inability to offer roaming easily can deter customers from subscribing.” *Id.* Small and mid-sized carriers, including rural carriers, cannot be viable competitive alternatives to the largest nationwide carriers unless they have access to roaming arrangements that enable nationwide coverage. Data roaming is critical for rural, small, and mid-sized wireless carriers because it fills gaps in coverage and enables nationwide coverage, and thereby allows providers to offer consumers the nationwide services they want. In particular, competitive carriers depend on roaming agreements with *nationwide* carriers to achieve genuine nationwide coverage. Carriers such as Intervenors simply cannot achieve nationwide coverage by cobbling together numerous agreements with rural and smaller carriers because they do not hold licenses covering the entire United States. They therefore are dependent on their larger competitors.

The FCC also concluded based on the extensive record that competitive carriers “have encountered significant difficulties obtaining data roaming arrangements.” *Id.* ¶¶17-20 (JA___ - ___). In particular, it found that the two super-carriers, Verizon and AT&T, have unreasonably denied competitors access to data roaming arrangements. The FCC cited specific evidence that (1) “AT&T

has largely refused to negotiate domestic 3G roaming arrangements until recently,” *id.* ¶25 (JA___); (2) multiple carriers reported “difficulties reaching agreements with Verizon Wireless,” *id.* ¶26 (JA___); (3) Verizon had delayed in even responding to requests for roaming negotiations, *id.*; and (4) Verizon had only nine EV-DO roaming arrangements as of April 2010 even though its EV-DO network had been operational since 2003, and covered more than 210 million people as of June 2007, *id.*

As a result of these super-carriers’ possession and abuse of market power, many smaller carriers and other commenters encouraged the FCC to determine that data roaming is a common carrier service and to address the data roaming problem with comprehensive regulation, including rate-setting. *Id.* ¶70 (JA___). The FCC, however, chose a less prescriptive path. The Commission refrained from subjecting data roaming services to common carrier duties pursuant to Title II of the Act, *id.* ¶¶68, 70 (JA___, ___), and chose instead to invoke its Title III authority to implement limited public interest obligations that are distinct from traditional common carrier requirements. The FCC did not prescribe rates. It did not mandate public rate tariffs. It did not mandate particular terms and conditions of roaming agreements or nondiscriminatory treatment of roaming carriers.

The FCC instead required individualized, market-based negotiations that could result in varying terms and conditions, based on numerous situation-specific

factors. Rather than prescribe rates or establish a presumption in favor of data roaming, the FCC established a duty to negotiate and a requirement of commercial reasonableness, which, it found, “will give host providers appropriate discretion in the structure and level of such rates that they offer.” *Id.* ¶21 (JA___). The rule allows parties to negotiate agreements and set rates through competitive market forces rather than government fiat, with the safeguard of a regulatory arbitration procedure if negotiations break down. The rule recognizes that the meaning of commercial reasonableness in any particular negotiation will depend on a number of individualized factors, including “the level of competitive harm in a given market and the benefits to consumers; the extent and nature of the requesting providers’ build-out; whether the requesting provider is seeking roaming for an area where it is already providing facilities-based service; and the impact of granting the request on the incentives for either provider to invest in facilities and coverage, services, and service quality.” *Id.* ¶68 (JA___). The rule ensures that host carriers are reasonably compensated for providing roaming services, while at the same time providing other carriers an avenue to obtain roaming services and protection from commercially abusive terms and conditions.

The data roaming rule also safeguards host carriers’ ability to protect their own networks against congestion arising from data roaming traffic, ensuring that data roaming arrangements will not meaningfully impair a host carrier’s ability to

serve its own retail customers. *Id.* ¶23 (JA___). This protection is something that the FCC did not provide host carriers for voice roaming. The rule also preserves the competitive advantage of host networks. A roaming carrier must pay for its customers' use of other carriers' networks, and facilities-based host carriers thus inevitably have a significant economic advantage over roaming carriers in terms of the margins that they can earn from consumer charges. The largest nationwide carriers will continue to have significant economic advantages over their smaller rivals who operate networks with a smaller geographic scope.

D. The Increasing Convergence of Common Carrier and Private Carrier Regulation

The progression of FCC rules over decades of regulation of mobile wireless services under Title III reflects broader developments in the law of common carrier and private carrier regulation. Consistent with the general trend of relying increasingly on market forces to constrain the behavior of common carriers and at the same time imposing greater regulatory limits on private carrier operations, the FCC has over time relied on its Title III authority to impose many similar obligations on common carriers and private carriers, lessening the distinctions between them and making their classification both more contextual and more nuanced.

1. The concept of common carriage was originally “used to impose a greater standard of care upon carriers who held themselves out as offering to serve

the public in general.” *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 640 (D.C. Cir. 1976) (“*NARUC I*”). Common carrier obligations traditionally have been imposed on entities, such as railroads, that exercised virtually monopolistic power in performing vital services for the public. *See id.*; *Munn v. Illinois*, 94 U.S. (4 Otto) 113, 131 (1877). Whether as a result of the service provider’s manner of holding itself out to the public or as a matter of regulatory compulsion (or both), regulators and courts developed a core understanding of what common carriage meant, which included the duties to file public tariffs, to charge cost-based “just and reasonable” rates, and to serve the public indiscriminately. *See, e.g., NARUC I*, 525 F.2d at 641 (describing the “quasi-public character” of a common carrier and its resultant duty “to carry for all people indifferently” (quotation marks and citation omitted)).

2. Over time, technological and economic developments in markets for communications services have led to an increasing overlap and convergence of common carrier and private carrier services and regulations. With respect to telecommunications providers that have traditionally been regulated as common carriers, the FCC has responded to the advent of competition by giving such carriers increased flexibility to select with whom they deal and on what terms. For example, the FCC has largely abandoned tariff requirements and—in decisions affirmed by this Court—now permits certain common carriers to engage in

individualized, confidential negotiations. *See Orloff v. FCC*, 352 F.3d 415, 418-19 (D.C. Cir. 2003); *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

And whereas at common law common carriers were defined by holding themselves out to broadly serve the public, *see Semon v. Royal Indem. Co.*, 279 F.2d 737, 739 (5th Cir. 1960), the FCC more recently has treated as common carriers entities that serve much narrower groups of customers, including their own affiliated customers. *Verizon Cal., Inc. v. FCC*, 555 F.3d 270, 275-76 (D.C. Cir. 2009).

This same dynamic has characterized the Commission's regulation of mobile wireless providers. Despite establishing distinct classifications for "commercial mobile service" and "private mobile services," *see* 47 U.S.C. §§332(d)(1)-(d)(2), Congress gave the FCC broad flexibility to establish appropriate levels of regulation for all mobile providers. *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd. 1411, 1417 ¶11 (1994). With respect to commercial mobile services, Congress gave the Commission express authority to forbear from applying most Title II common carrier requirements if such forbearance is in the public interest. *Id.* at 1418. The FCC proceeded to adopt a deregulatory approach, such that the modern wireless industry, as this Court has recognized, "bears [] little resemblance to the paradigm" in which courts originally defined common carriage. *Orloff*, 253 F.2d at 420.

At the same time, the FCC has taken steps to promote the public interest by imposing on non-common carriers regulations that share some basic characteristics of common carriage. For example, the FCC exercises its Title I authority to impose certain duties traditionally associated with common carrier status on interconnected Voice over Internet Protocol (“VoIP”) services,⁶ despite its consistent refusal to classify those services as common-carrier “telecommunications services.” In doing so, the FCC took care not to cross the line into “traditional common carrier economic regulations.”⁷

The FCC also has imposed on vertically integrated cable operators rules that prohibit unreasonable discrimination in prices, terms, and conditions in the provision of programming to competing distributors and limit exclusive contracts with affiliated programming vendors.⁸ This Court upheld those rules, *Cablevision*

⁶ See, e.g., *IP-Enabled Services*, Report and Order, 24 FCC Rcd. 6039, 6047 ¶14 (2009) (extending to interconnected VoIP providers “discontinuance” obligations imposed on telecommunications carriers that require regulatory approval before service may be withdrawn from the public); see also *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1241-42 (D.C. Cir. 2007) (extending to interconnected VoIP providers universal service fund contribution obligations applicable to telecommunications carriers); *Nuvio Corp. v. FCC*, 473 F.3d 302, 311 (D.C. Cir. 2006) (requiring interconnected VoIP providers to provide enhanced 911 capabilities comparable to those required of telecommunications carriers).

⁷ *IP-Enabled Services*, 24 FCC Rcd. at 6047 ¶15 n.49.

⁸ See *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd. 746, 753 ¶12 (2010).

Sys. Corp. v. FCC, 597 F.3d 1306, 1308 (D.C. Cir. 2010), without any suggestion that their implementation regulated cable operators as common carriers in violation of Section 621(c) of the Act. *See* 47 U.S.C. §541(c) (“Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.”); *cf. Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1001-02 (D.C. Cir. 1987) (upholding agency’s adoption of gas transportation non-discrimination requirement despite a statute providing that transporters may not “be subject to regulation as a common carrier”).

Finally, throughout the 2000s, the FCC implemented wireless resale and manual roaming rules, and, in response to challenges akin to Verizon’s claims here, rejected as “inapt” the argument that its wireless resale rule was “overbroad because it extends to non-Title II services”—*i.e.*, to any service other than a common carrier “telecommunications service”—concluding that its Title III authority is sufficiently broad to apply to “telecommunications services” and “information services” alike. *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd. 16340, 16352-53 ¶27 (1999).⁹ With respect to data

⁹ Under the Telecommunications Act of 1996, a company that offers some type of “telecommunications” functionality can either: (1) provide a “telecommunications service” as a “telecommunications carrier”—which, as the FCC and this Court have determined, “means essentially the same as common carrier,” *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926 (D.C.

services offered by wireless carriers as “information services” (*i.e.*, on a non-common-carrier basis), the FCC determined that it would be “imprudent to distinguish between voice and data services offered by broadband PCS and cellular providers and that both should be subject to the resale rule.” *Id.* ¶58. On reconsideration, the FCC reaffirmed its policy judgment that a voice/data distinction would be “imprudent.” *Id.* ¶59.

The FCC likewise refused to limit its exercise of Title III authority to common carrier voice services in implementing its manual roaming requirements. When a party argued that certain data-only “SMR” services should be excluded from the manual roaming obligation because “such services do not compete in the same market” as traditional wireless voice services, the FCC disagreed and instead modified its roaming rule to cover SMR providers of data services, citing its extension of resale requirements to voice and data services alike.¹⁰

Cir. 1999) (“*VITELCO*”); or (2) it can operate as a non-common carrier by offering “telecommunications” on a private-carrier basis or by including that function as an integrated component of an “information service.” In the wireless telecommunications context, “commercial mobile services” are both “telecommunications services” and “common carrier” services, whereas “private mobile services” are neither. 47 U.S.C. §§332(d)(1), 332(d)(3).

¹⁰ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Third Report and Order and Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd. 15975, 15979 ¶11, 1598 ¶18 (2000). The FCC likewise decided that data-only SMR services should be included within its spectrum ownership cap for “commercial mobile services,” despite their classification as information services, based on the

The data roaming rule thus must be understood against the backdrop of the ongoing convergence of common carrier and private carrier regulation, and the FCC's recognition that Title III authorizes it to regulate the medium of spectrum, irrespective of what service is offered over that spectrum. Verizon alone challenges the FCC's nuanced and balanced rule as an impermissible exercise of its authority.

SUMMARY OF ARGUMENT

Verizon argues that the *Order* exceeds the FCC's Title III authority and imposes an impermissible common carrier obligation because some of the requirements imposed by the data roaming rule are similar to obligations that, in other contexts, have been imposed on common carriers. Neither challenge has merit. For the reasons stated in the FCC's brief, the Order was well within the scope of the Commission's traditional Title III authority, including in particular its authority under Section 303(b) of the Act, 47 U.S.C. §303(b). And Verizon's rigid conception of what does and does not constitute common carriage flies in the face of governing precedent. The FCC reasonably concluded, based on a careful analysis of the nature of the service and regulations at issue, that the *Order* springs

convergence of voice and data services, and this Court upheld that determination. *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1223 (D.C. Cir. 1999).

from the heart of its Title III authority and does not constitute common carriage.

No more is required.

Courts repeatedly have held that determining if a particular regulation is a common carrier regulation requires a context-specific, fact-intensive analysis that agencies are uniquely positioned to undertake. So long as a regulation does not impose the core common carriage obligation of compelling indiscriminate service—an obligation that the FCC refused to impose here—the Commission is entitled to substantial deference in its determination that the regulation does not amount to common carriage.

The FCC's conclusion that the data roaming rule is not common carriage was eminently reasonable. The FCC *rejected* the requirement to offer indiscriminate service, and instead merely obligated carriers to negotiate in a “commercially reasonable” manner that will result in individualized rates, terms, and conditions. The flexible commercial reasonableness requirement will result in unique agreements that do not resemble “indiscriminate” service to the public. Although Verizon insists that the rule will in fact be applied in a manner that requires a carrier to deal with all comers indiscriminately, that argument is not ripe. For purposes of this facial challenge the FCC should be taken at its word that the *Order* does not compel indiscriminate service.

The FCC's classification is further bolstered by the absence from the *Order* of any other traditional features of common carriage regulation. It does not require public rate tariffs or oblige carriers to charge "just and reasonable" rates. Indeed, the *Order* does not contain a single feature of traditional common carriage regulation.

Verizon also errs in insisting that the *Order* contravenes the FCC's earlier *Voice Roaming Order*. In the voice roaming context, the FCC implemented obligations to serve indiscriminately, on "just and reasonable" terms and conditions. In the data roaming context, by contrast, the FCC endorsed much greater flexibility, and expressly rejected the common carrier standards that it had implemented in the voice context.

Finally, this Court should reject Verizon's invocation of constitutional doubt to narrow the FCC's statutory authority. For all of the reasons the FCC explains, the data roaming rule will not effect any takings at all, physical or regulatory. But even if it did implicate potential takings, Verizon has no grounds to argue that the rule will effect takings without just compensation when on its face the *Order* requires no service without commercially reasonable rates.

The FCC reasonably concluded that the *Order* falls squarely within its broad Title III authority. That conclusion is entitled to deference from this Court. The petition for review should be denied.

ARGUMENT

I. SECTION 332 OF THE TELECOMMUNICATIONS ACT DOES NOT BAR THE FCC'S ACTIONS

Verizon's principal argument is that the data roaming rule is a *de facto* common carrier regulation that violates Section 332(c) of the Act.¹¹ But contrary to Verizon's claim, the Act affords the FCC substantial flexibility to ensure seamless connectivity across wireless networks without violating the bar against common carrier regulation. Short of imposing a duty to serve all comers indiscriminately—which the FCC expressly declined to impose here—the FCC has substantial discretion under *Chevron* to regulate private mobile carriers without running afoul of the Act's common carrier proscription. Particularly in light of

¹¹ Because the FCC assumed without deciding that data roaming is an information service, as opposed to a telecommunications service, the question of its proper statutory classification is not presented by this appeal. But there is good reason to believe that the FCC would have authority to treat data roaming as a telecommunications service, because it is in essence the sale of wholesale transmission capability underlying a retail information service, and the FCC has treated the transmission component of broadband Internet access as telecommunications. *See, e.g., Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd. 7866 (2010) (seeking comment on whether broadband Internet access providers should be compelled to offer the underlying transmission capability on a common carrier basis notwithstanding the retail information service classification); *cf. Time Warner Cable Request for Declaratory Ruling*, Memorandum Opinion and Order, 22 FCC Rcd. 3513, 3517 ¶9 (2007) (“[T]he statutory classification of the end-user service ... is not dispositive of the wholesale carrier's rights”).

that deferential standard of review, Verizon fails to demonstrate that the data roaming rule *must* be considered a common carrier requirement.¹²

A. The FCC’s Application of Section 332 is Entitled to Substantial Deference

The FCC’s determination that the rule’s data roaming requirements do not constitute common carrier regulation is precisely the type of interstitial lawmaking that is entitled to deference under *Chevron*.¹³ “[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency,” *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (internal quotation marks and citations omitted), given that filling statutory gaps “involves difficult policy choices that agencies are better equipped to make than courts.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

Because the Act does not specify what constitutes a “common carrier” requirement, the FCC was required to exercise its discretion in determining how to

¹² Indeed, the structure and legislative history of the Act support the argument that Section 332(c)’s requirement that a private mobile radio service provider not “be treated as a common carrier” simply means that the provider cannot be subjected to the specific strictures of Title II. *See Ex Parte* Letter of MetroPCS, WT Docket No. 05-265, at 12-16 (filed Nov. 11, 2010).

¹³ As the FCC explains in its brief, Verizon’s misplaced argument that *Chevron* deference should not apply in this case is foreclosed by binding precedent. *See* FCC Br. 27.

classify the data roaming rule. *See VITELCO*, 198 F.3d at 925-26 (deferring to FCC's application of common carrier limitations because the relevant statutory language is "vague and openended"). Although the principal hallmark of common carriage is the requirement to serve the public "indifferently" or "indiscriminately," *Verizon Br. 29*; *see also NARUC I*, 525 F.2d at 641; *Sw. Bell*, 19 F.3d at 1481; *VITELCO*, 198 F.3d at 924-26, that concept is not itself defined with precision in the law. The FCC's express determination as the expert agency charged with regulating communications services under the Act that its data roaming requirement does *not* require a carrier to serve the public indiscriminately is therefore entitled to substantial deference. *See Order* ¶68 & n.198 (JA___); *FCC Br. 31 & n.15*; *infra* Section I.B.

The same is true with respect to other traditional indicia of common carrier status and regulation. For example, this Court has highlighted the traditional common carrier requirement of filing public rate tariffs, although it has found that lack of tariffs does not necessarily result in private carrier status. *Compare Orloff*, 352 F.3d at 418 (publication of rates is the centerpiece of common carriage under the Communications Act), *with Iowa Telecomms. Servs., Inc. v. Iowa Utils. Bd.*, 563 F.3d 743, 749 (8th Cir. 2009) (confidential rates do not compel classification as a private carrier). Likewise, the Court has held that individual negotiation of customer-specific contracts is a hallmark of *private* carriage but, depending on the

circumstances, a carrier can be a common carrier even if it negotiates each contract. *Compare Sw. Bell*, 19 F.3d at 1481 (individualized contracts indicate that a carrier is not a common carrier), *with Iowa Telecomms. Servs.*, 563 F.3d at 750 (individually negotiated contracts do not defeat finding that carrier is a common carrier). And while a service may be offered to the public (and thus potentially qualify as common carriage) even if it is offered only to a small subset of the public, *NARUC I*, 525 F.2d at 641-42, this Court also deferred to the FCC's holding that a carrier does not make its services "available to the public," and is therefore not a common carrier, if its services are available "only to a specified class of eligible users under the Commission's Rules" or "to a significantly restricted class of users." *VITELCO*, 198 F.3d at 924-26 (quotation marks and citations omitted).

The lesson of these cases is that, contrary to Verizon's attempt to manufacture bright-line distinctions between common carriage and private carriage, the question whether the presence of various attributes amounts to common carriage in a particular case requires a considered, contextual judgment. This Court accordingly has held that determining whether an entity is a common carrier depends on the totality of the circumstances, *Verizon Cal.*, 555 F.3d at 275, and "whether an entity in a given case is to be considered a common carrier or a

private carrier turns on the particular practice under surveillance.” *Sw. Bell*, 19 F.3d at 1481. The FCC is uniquely qualified to make that assessment.

B. The FCC Reasonably Concluded That the Order Does Not Establish Common Carrier Obligations

In exercising its discretion, the FCC reasonably determined that the data roaming rule is not a common carrier regulation. The obligations imposed by the data roaming rule do not require its treatment as a common carrier regulation, and no Commission precedents establish that similar obligations must be considered proof of common carriage.

1. The Order Does Not Require Indiscriminate Service or Other Traditional Attributes of Common Carriage.

The data roaming requirements do not include the traditional hallmarks of common carriage. Most significantly, the FCC reasonably concluded that the *Order* does not require carriers to serve the public “indifferently” or “indiscriminately.” As this Court has noted, “the traditional mark of common carrier service” is “the indiscriminate offering of service on generally applicable terms.” *Sw. Bell*, 19 F.3d at 1481; *see also NARUC I*, 525 F.2d at 641. The *Order* explains that the data roaming rule allows providers to “offer data roaming arrangements on commercially reasonable terms and conditions tailored to individual circumstances *without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms.*” *Order* ¶45 (JA___)

(emphasis added). Such individually tailored arrangements represent the opposite of a common carrier duty to deal with all comers on “generally applicable terms” or “indifferently.” *See Computer & Commc’ns Indus. Ass’n v. FCC*, 693 F.2d 198, 205, 210 (D.C. Cir. 1982) (noting that making “individualized decisions in particular cases” is “the hallmark of a non-common carrier service” (citation omitted)).

The FCC pointed to numerous aspects of data roaming agreements that will be highly individualized: each agreement will be separately negotiated, and each can have different rates, different durations, and different non-price terms and conditions that could vary widely based on numerous factors. Those individualized factors include the level of build-out in a particular market, whether the requester seeks roaming in a market where it already provides facilities-based service, the impact of the roaming arrangement on incentives to build out in that particular market, the degree of technical incompatibility between networks, the particular generation of wireless services at issue, and the extent of safeguards necessary to protect against congestion. *Order* ¶68 (JA___).

The FCC must be taken at its word that its data roaming rule will not require carriage of all comers “indifferently” unless or until it is applied in a contrary fashion. *See FCC Br. 45*. Although the rule creates a duty to *negotiate* with others, it does not create a duty to deal with others on an indifferent or

indiscriminate basis (notwithstanding many commenters' calls for such a requirement). And even if individualized negotiations in some instances may be *consistent with* a finding of common carriage, *see, e.g., Iowa Telecomms. Servs.*, 563 F.2d at 750, the FCC reasonably concluded that such a classification is not *compelled* in light of the high degree of individualization present here. *See VITELCO*, 198 F.3d at 924-26.

Indeed, Verizon itself has recognized that engaging in individualized negotiations, in a manner that is “commercially reasonable,” does not amount to “indiscriminate” service. Before the FCC, Verizon argued that its wholesale provision of data roaming was not offered on a common carriage basis because Verizon makes “individualized decisions” with potential roaming partners. Reply Comments of Verizon Wireless at 31-32, WT Docket No. 05-265 (filed July 12, 2010) (JA___ - ___). Verizon emphasized that its individualized decision-making was not an effort “to freeze out potential roaming partners, but instead reflects a commercially reasonable, market-based approach.” *Id.* at 32 n.102 (JA___). When the FCC memorialized Verizon’s own preferred market-based framework, it did not convert data roaming into a common carrier obligation, but rather exercised the public interest authority that it has long been recognized to possess irrespective of a service’s classification.

The data roaming rule also lacks other traditionally important indicia of common carriage. For example, the data roaming rule does not require carriers to file public rate tariffs or otherwise to make the terms of their roaming deals public. To the contrary, the FCC expressly ruled that rates should be subject to individual negotiations in which host providers have “discretion in the structure and level of such rates that they offer.” *Order* ¶21 (JA___). Of course, the FCC has detariffed rates in a variety of contexts, but it is nonetheless relevant to this analysis that the FCC did not implement any version of what this Court has called the “centerpiece” of traditional common carriage regulation. *Orloff*, 352 F.3d at 418.

Nor does the rule obligate providers of data roaming to charge “just and reasonable” rates. In the Interstate Commerce Act of 1887—the first U.S. statute to codify common carrier obligations—Congress “made it the duty of carriers subject to its provisions to charge only just and reasonable rates.” *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907); *see also New York, New Haven & Hartford R.R. Co. v. Interstate Commerce Comm’n*, 200 U.S. 361, 391 (1906). The “just and reasonable” requirement is codified in the common carrier provisions of Communications Act. *See* 47 U.S.C. §201(b); *MCI Telecomms. Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 1995). “Just and reasonable” rates traditionally were tied to some measure of a utility’s cost. *See Verizon Commc’ns. Inc. v. FCC*, 535 U.S. 467, 477-89 (2002); *MCI Telecomms.*

Corp. v. FCC, 675 F.2d 408, 410, (D.C. Cir. 1982) (observing that “[a] basic principle used to ensure that rates are ‘just and reasonable’ is that rates are determined on the basis of cost”).¹⁴ The FCC has discretion to determine how best to evaluate cost in a particular context, *Verizon Commc’ns*, 535 U.S. at 489, including granting pricing flexibility in competitive markets, *see, e.g., Orloff*, 352 F.3d at 420-21. But here, by contrast, the FCC did not implement cost-based rates, nor did it undertake to ensure that data roaming rates are “just and reasonable” via any alternative common carrier methodology.

Verizon asserts that the “commercially reasonable” standard for data roaming rates, terms, and conditions is equivalent to the “just and reasonable” standard traditionally applicable to common carriers, *Verizon Br. 33*, but the FCC cogently rejected that assertion in the *Order* and its brief. Aside from both standards’ use of the word “reasonable,” there is no basis at this point for the Court to conclude that “commercially reasonable” is synonymous with “just and reasonable.” The FCC stated precisely the opposite: “[W]e here *reject*—rather

¹⁴ Indeed, even when regulators defer to market forces to satisfy that standard, this Court has noted that a cost analysis is relevant. *See NetCoalition v. SEC*, 615 F.3d 525, 537 (D.C. Cir. 2010) (“On the contrary, in a competitive market, the price of a product is supposed to approach its marginal cost, *i.e.*, the seller’s cost of producing one additional unit.”).

than determine how to enforce—a common carriage requirement of ‘just and reasonable’ rates, terms, and conditions.” *Order* ¶168 n.198 (JA___).¹⁵

Again, if the FCC were to prescribe “just and reasonable” rates in enforcing its rule—despite its rejection of such a requirement in the *Order*—Verizon then could mount an as-applied challenge to the FCC’s enforcement action. But nothing in the *Order* facially establishes a common carrier obligation to provide “just and reasonable” terms and conditions, and Verizon’s insistence that the FCC will impose such a requirement is unripe. *See Sprint Corp. v. FCC*, 331 F.3d 952, 956 (D.C. Cir. 2003) (“[W]here the agency retains substantial discretion to implement its decision, the decision is not ripe for judicial review until it has been implemented in particular circumstances.”).

2. The *Data Roaming Rule* Is Distinguishable from the Rules at Issue in *Midwest Video II*

Verizon’s reliance (at 29-33) on *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (“*Midwest Video I*”), is unavailing, because the data roaming rule is readily distinguishable from the rules struck down in that case. The key feature of those rules was a requirement that cable operators establish a spectrum commons by

¹⁵ As Bright House Networks noted in the proceeding below, the FCC and Congress have required “reasonable” rates in numerous contexts, none of which were equated to the common carrier notion of “just and reasonable” rates. *See Ex Parte* Letter from Daniel L. Brenner, Counsel for Bright House Networks, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265 (filed Jan. 11, 2011).

dedicating access channels for others to use on a “first-come, nondiscriminatory” basis. *Id.* at 694. The rules required cable operators to dedicate four separate channels for public, governmental, educational, and leased access. *Id.* at 692. They also required cable operators to make their equipment available for those using public-access channels. *Id.* at 693. The *Midwest Video II* rules also specifically restricted what operators could charge for access and use of equipment, and, in many cases, prohibited any charges whatsoever. *Id.* at 694, 702. “Under the rules, cable operators are deprived of all discretion” regarding the use of their channels. *Id.* at 693. The *Midwest Video II* regulations thus treated cable operators as operating an open, public resource to which the public was entitled to have access, essentially for free.

The data roaming rule does not impose any comparable obligation to “dedicate” any capacity for others or to operate a public commons. To the contrary, if a carrier faces constraints in its network capacity, it may invoke that factor as a basis for conditioning the availability of data roaming. *Order* ¶52 (JA___). The data roaming rule also does not include the obligation to provide service “on a first-come, nondiscriminatory basis.” Carriers at all times retain exclusive control over their own facilities, and they may charge others

commercially reasonable rates via market-based negotiation.¹⁶ Therefore, unlike the rules in *Midwest Video II*, the data roaming requirements at issue here do not oblige carriers to serve all comers indifferently.

3. The Order Fits Comfortably Within the Parameters of Cases Upholding FCC Regulations of Private Carriers

The more appropriate analogues for the data roaming requirements are found in cases upholding the FCC's regulation of non-common carriers. Although Verizon contends that the *Order* deprives roaming providers of "discretion over *whether* and with whom to deal" and that such a restriction is tantamount to a duty to serve the public indifferently, Verizon Br. 30-32, the Supreme Court's analysis of comparable regulations refutes that claim. In *United States v. Southwestern Cable Co.*, for example, the Court upheld the FCC's authority to regulate community antenna television systems (CATV), including authority to issue an order that restricted the expansion of CATV service in areas in which a provider had previously not operated. 392 U.S. 157, 160-61 (1968). The challengers argued that the FCC's restrictions on how and to whom CATV systems could provide service impermissibly amounted to common carrier obligations, but the

¹⁶ The Supreme Court in *Midwest Video II* also found it critical that those rules "transferred control of the content of access cable channels from cable operators to members of the public." 440 U.S. at 700. According to the Court, the Communications Act established that, with regard to public discourse, "Congress chose to leave broad journalistic discretion with the licensee." *Id.* at 703 (quotation marks and citation omitted). There is no comparable concern over "journalistic discretion" here.

Court rejected that challenge and held that the appropriate question was simply whether the FCC's regulation was "reasonably ancillary to the effective performance of the Commission's various responsibilities." *Id.* at 178. Under *Southwestern Cable*, whether a regulation that merely *affects* the manner in which a carrier deals with other parties constitutes a common carrier obligation is left to the expert judgment and analysis of the FCC. *Id.* at 172.

Likewise, the Supreme Court upheld cablecasting rules in the predecessor to *Midwest Video II*. See *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) ("*Midwest Video I*"). Just as Verizon argues here that regulatory limits on its discretion to choose roaming partners must be deemed a form of common carriage, the FCC's cablecasting rules came under attack on similar grounds. But the Supreme Court rejected the claim that the FCC "abrogate[d] the cable operators' control over the composition of their programming," finding that instead "[i]t compelled operators only to assume a more positive role in" in maximizing outlets for local expression and diversification of programming. *Midwest Video II*, 440 U.S. at 700 (describing and distinguishing holding of *Midwest Video I*). The data roaming rule, like the cablecasting rules upheld in *Midwest Video I*, leaves carriers with exclusive control over their network facilities and only requires them to negotiate commercially reasonable terms and conditions, in order to protect against serious harms to competition.

4. The FCC Reasonably Concluded that the *Order* Does Not Conflict With Its Prior Orders

Verizon also errs in insisting that the *Order* conflicts with the *Voice Roaming Order*. Verizon argues that the *Voice Roaming Order* established that “roaming” is by its nature a common carrier obligation that cannot lawfully be extended to data services. Verizon Br. 35-36 (citing *Voice Roaming Order*). But the *Voice Roaming Order* established no such thing.

The FCC made clear in the *Voice Roaming Order* that its analysis of roaming was limited to voice services. *Voice Roaming Order* ¶5. Read in context, the references to “roaming” throughout that order unquestionably are references to the voice roaming rule then under consideration. The FCC merely stated that the roaming rule *at issue in that order*, which applied to a common carrier service, was imposed as a common carrier requirement.

Verizon’s suggestion that the FCC found that roaming “cannot lawfully be applied to private mobile services or information services,” Verizon Br. 35, is also a misreading of the *Voice Roaming Order*. To the extent the *Voice Roaming Order* addressed the issue, it explained only that roaming *did not* at the time extend to data—it did not say that roaming *could not* extend to data. *Id.* ¶2. Indeed, far from ruling out the imposition of roaming on non-common carrier services, the FCC went on to “seek comment on whether [the FCC] should extend the automatic roaming obligation to non-interconnected services or features, including services

that have been classified as information services.” *Id.* ¶77. The FCC thus initiated a new proceeding to analyze precisely the issues that Verizon claims it had conclusively resolved—whether and how roaming obligations should be extended to data services.

Verizon is equally mistaken in arguing that the common carrier obligations imposed in the *Voice Roaming Order* are indistinguishable from those imposed here. The FCC in the voice roaming context specifically compelled “non-discriminatory” terms. *See, e.g., id.* ¶37. The data roaming rule does not contain a non-discrimination mandate, and reflects greater flexibility with regard to rates, terms, and conditions of service that the FCC authorized for data roaming. The *Voice Roaming Order* also required carriers’ terms and conditions to be “just” and “reasonable,” *id.* ¶¶1, 23, whereas the FCC in the data roaming context expressly rejected the just and reasonable standard. *Order* ¶68 n.198 (JA___); *see also* FCC Br. 39-43 (rebutting Verizon’s argument that the “commercially reasonable” and “just and reasonable” standards have the same meaning).

Finally, the *Voice Roaming Order* also contains a presumption of reasonableness if networks are technologically compatible. *Voice Roaming Order* ¶33. This presumption in effect means that a carrier must serve a voice roaming requester so long as there is network compatibility, which is closely tied to the common carriage notion of serving all comers when possible. *See NARUC I*, 525

F.2d at 641-42. But there is no similar presumption in the data context. The absence of such a presumption in this *Order* reflects the more multi-faceted nature of market-based data roaming negotiations.

* * *

Ultimately, the best that Verizon can do is to point to certain features of the data roaming rule that bear some similarity to rules that, in other contexts, were viewed as common carrier obligations. But context matters. Based on the particular facets of the rule and service at issue, the FCC concluded that the genuinely individualized nature of negotiations and the individualized rates, terms, and conditions that would result meant that the data roaming rule was more appropriately considered a form of private carrier regulation than a common carrier requirement. That conclusion was reasonable, and should resolve this case.¹⁷

II. THE DATA ROAMING RULE DOES NOT AMOUNT TO AN UNCONSTITUTIONAL TAKING

In addition to its statutory and APA claims, Verizon offers a grab-bag of theories for why the Court must construe the FCC's statutory authority narrowly to avoid an unconstitutional taking, Verizon Br. 52-56, but none of its arguments is persuasive.

¹⁷ Intervenors join and incorporate by reference the FCC's well-reasoned explanation as to why the rule is well within the scope of its Title III authority. *See* FCC Br. 46-52. For example, Section 303(b) of the Act provides clear authority for the data roaming rule. 47 U.S.C. §303(b).

In *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), this Court invoked constitutional avoidance to adopt a narrowing construction that would avoid a taking that could expose the U.S. Treasury to “massive and unforeseen” liability to provide just compensation. *Id.* at 1445. More recently, in *National Mining Ass’n v. Kempthorne*, this Court recognized an implicit limitation in *Bell Atlantic*: the assertion of a potential taking does not implicate the canon of constitutional avoidance unless the challenger demonstrates a realistic likelihood that the government actually might have to pay “massive and unforeseen” compensation for takings. 512 F.3d 702 (D.C. Cir. 2008); accord *United States v. Riverside Bayview Homes*, 474 U.S. 121, 127-28 (1985) (if compensation is available for a purported taking, there is no constitutional problem to avoid, and “adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty; it merely frustrates permissible applications of a statute or regulation” (citation omitted)).

Verizon’s constitutional avoidance argument fails under these precedents because, even if Verizon could prove the data roaming rule will effect a taking—and it cannot, for the reasons explained by the FCC (FCC Br. 57-59)—Verizon cannot credibly argue that it would be a taking “without just compensation.” U.S. Const. amend. V. The *Order* on its face authorizes host carriers to charge commercially reasonable rates for their roaming services. Verizon cannot establish

on a facial challenge that commercially reasonable rates agreed upon through market negotiations would not be just compensation for any of the physical or regulatory takings it alleges. *Cf. Verizon Commc'ns., Inc. v. FCC*, 535 U.S. 467 (2002); *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989); *see also Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).¹⁸

III. IF THE COURT GRANTS THE PETITION, THE APPROPRIATE REMEDY IS REMAND

The data roaming rule fits comfortably within the FCC's authority, but if the Court disagrees, the appropriate remedy is remand, not vacatur. Before the FCC, parties proposed multiple jurisdictional bases for a data roaming rule. In addition, several parties argued that the FCC should characterize data roaming as the functional equivalent to CMRS. *See* 47 U.S.C. §303(d)(3) (excluding from the definition of "private mobile service" any service that is "the functional equivalent of a commercial mobile service"). The FCC, however, chose to issue its order exclusively under Title III. If the Court decides to grant Verizon's petition, the

¹⁸ To the extent that Verizon argues that the data roaming rule in practice will result in rates that constitute a *de facto* taking, it is "settled beyond dispute" that "so long as the rates set are not confiscatory, the Fifth Amendment does not bar their imposition." *FCC v. Fla. Power Corp.*, 480 U.S. 245, 253 (1987). The *Order* ensures that rates will not be confiscatory because they are set via market-based negotiations, with a dispute resolution safeguard. *Order* ¶¶71-87 (JA ___ - ___). In any event, arguments that roaming rates in practice might be confiscatory are unripe. *See Southern Co. Servs. v. FCC*, 313 F.3d 574, 581-82 (D.C. Cir. 2002).

Court should remand for the FCC to consider whether alternate jurisdictional bases in the record support its rule.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review and uphold the *Order*.

Respectfully submitted,

/s/ Richard P. Bress

Richard P. Bress

James H. Barker

Matthew A. Brill

Alexander Maltas

LATHAM & WATKINS LLP

555 11th St. NW, Suite 1000

Washington, DC 20004

(202) 637-2200

January 23, 2012

*Counsel for Leap Wireless International, Inc. and
Cricket Communications, Inc.*

On behalf of all Intervenors

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of this Court's October 17, 2011 Order because this brief contains 8,625 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and DC Circuit Rule 32(a)(2).

This brief complies with the typeface and type style requirements of Rules 32(a)(5) and 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in proportionally spaced, 14-point Times New Roman typeface using Microsoft Word 2010.

/s/ Richard P. Bress

CERTIFICATE OF SERVICE

I, Richard P. Bress, hereby certify that on January 23, 2012, I electronically filed the foregoing Joint Brief for Intervenors in Support of the Federal Communications Commission by using the Court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF System. Some of the participants, denoted with asterisks below, are not CM/ECF users.

I further certify that I served the foregoing document on those persons via First-Class U.S. mail, unless another attorney at the same mailing address is receiving electronic service.

Austin Schlick
Peter Karanjia
Richard K. Welch
Laurence N. Bourne
Federal Communications Commission
Washington, DC 20554
Counsel for FCC

Helgi C. Walker
Thomas R. McCarthy
Brett A. Shumate
*Andrew G. McBride
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
Counsel for Cellco Partnership

Sharis A. Pozen
Catherine G. O'Sullivan
Finnuala K. Tessier
United States Department of Justice
Washington, DC 20530
Counsel for United States of America

John T. Scott
Verizon Wireless
1300 Eye Street NW
Suite 400 West
Washington, DC 20005
Counsel for Cellco Partnership

Harvey Weissmann
Munger, Tolles & Olson
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071
Counsel for Cellco Partnership

Howard J. Symons
Mintz Levin Cohn Ferris, et al.
701 Pennsylvania Ave. NW
Suite 900
Washington, DC 20004
Counsel for T-Mobile USA, Inc.

*Thomas J. Sugrue
*Luisa L. Lancetti
T-Mobile USA, Inc.
401 9th Street, N.W.
Suite 550
Washington, D.C. 20004
Counsel for T-Mobile USA, Inc.

Harold J. Feld
Public Knowledge
1818 N Street, N.W.
Suite 410
Washington, D.C. 20036
Counsel for Public Knowledge, et al.

/s/ Richard P. Bress