BRIEF FOR RESPONDENTS

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

NO. 11-1135 & 11-1136

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS,

APPELLANT/PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

APPELLEE/RESPONDENTS.

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

SHARIS A. POZEN
ACTING ASSISTANT ATTORNEY GENERAL

CATHERINE G. O'SULLIVAN
FINNUALA K. TESSIER
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

AUSTIN C. SCHLICK
GENERAL COUNSEL

PETER KARANJIA
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY ASSOCIATE GENERAL COUNSEL

LAURENCE N. BOURNE
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

All parties, intervenors, and amici appearing in this Court and before the Commission are listed in the petitioner's brief.

2. Ruling under review.

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*") (J.A.), 76 Fed. Reg. 26199 (May 6, 2011).

3. Related cases.

This case has not previously been before this Court. We are not aware of any related case pending before this Court or any other Court.

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GLOSSARY

3G	Third generation mobile broadband service
Act	The Communications Act of 1934, as amended
AT&T	AT&T Corp.
Br.	Brief
CMRS	Commercial mobile radio service
Commission or FCC	Federal Communications Commission
J.A.	Joint Appendix
Verizon	Cellco Partnership d/b/a Verizon Wireless

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JURISDICTION

The *Order* on review was released on April 7, 2011, and a summary thereof was published in the Federal Register on May 6, 2011. *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*") (J.A.), 76 Fed. Reg. 26199 (May 6, 2011). Cellco Partnership d/b/a/ Verizon Wireless ("Verizon") filed its appeal (Case No. 11-1135) and its petition for review (Case No. 11-1136) of

the *Order* on May 13, 2011. This Court's jurisdiction rests on 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).[1]

STATEMENT OF ISSUES

"Data roaming" allows consumers to obtain data service over their cellular phones and other mobile devices when they travel outside their own wireless provider's network coverage area, by relying on another wireless provider's network. For example, data roaming may be necessary for a customer who lives in West Virginia to access the Internet in Washington, D.C., using her "smartphone." In the *Order* on review, the Federal Communications Commission ("FCC" or "Commission") found that some wireless providers were refusing to negotiate data roaming arrangements with other providers, and that this was preventing seamless nationwide access to

[1] Verizon's notice of appeal in Case No. 11-1135 asserts that the *Order* modifies its wireless licenses within the meaning of 47 U.S.C. § 402(b)(5). Notice of Appeal, Case No. 11-1135, at 2 (filed May 13, 2011). Section 402(b), however, does not apply to license modifications effectuated by a generally applicable rulemaking order (like the *Order* challenged here), rather than in a licensee-specific adjudication. *See, e.g., Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 587, 589 (D.C. Cir. 2001) (dismissing section 402(b) appeal of FCC order that "alter[ed] the term[s] of existing licenses by rulemaking" and instead accepting concurrently filed petition for review under 47 U.S.C. § 402(a)). Because sections 402(a) and 402(b) provide "mutually exclusive" channels for review of FCC orders, the Court should dismiss Case No. 11-1135 for want of jurisdiction and hear the petition for review filed under section 402(a) in Case No. 11-1136. *Vernal Enters., Inc. v. FCC*, 355 F.3d 650, 655 (D.C. Cir. 2004).

mobile data services. The Commission accordingly required providers of mobile data services to offer to negotiate data roaming arrangements with other such providers, while leaving the providers broad flexibility to agree on individualized terms on a case-by-case basis. The questions presented are as follows:

1. Whether the FCC acted within its statutory authority when it adopted a rule requiring facilities-based providers of commercial mobile data services to offer to negotiate individually tailored data roaming arrangements with other such providers on commercially reasonable terms.

2. Whether the FCC acted within its discretion under the Administrative Procedure Act, 5 U.S.C. § 706(2), in concluding that the rule it adopted is in the public interest.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are appended to this brief.

COUNTERSTATEMENT OF THE CASE

Propelled by the increasing popularity of smartphones (like Apple's iPhone) and tablets (like the iPad), consumer demand for mobile Internet access has exploded in recent years. Today, tens of millions of Americans rely on wireless devices to access mobile broadband service for business or personal use. The utility of mobile broadband service, however, is seriously

eroded if consumers lose connectivity when they travel (or "roam") outside their own wireless provider's network coverage area. Data roaming agreements between service providers address this problem and thereby expand consumer access to nationwide mobile broadband service.

In a notice-and-comment rulemaking proceeding, the FCC considered the need for rules addressing data roaming arrangements between providers of mobile broadband service. The administrative record showed that wireless providers had been unable to secure data roaming arrangements – that would enable them to offer the nationwide coverage needed for a competitive product offering – with AT&T and Verizon (by far the two largest wireless providers, whose networks use wide swaths of FCC-licensed spectrum across the country).

On that record, the FCC in the *Order* on review exercised its authority under Title III of the Communications Act of 1934, among other statutory provisions, to adopt a rule that requires facilities-based providers of commercial mobile data services to offer to negotiate data roaming agreements with each other on individualized terms and conditions. In addition to facilitating consumer access to nationwide mobile broadband service, the FCC found that the rule would promote investment in and

deployment of mobile broadband networks as well as competition among multiple providers of mobile data services.

Verizon – alone among all commercial mobile data services providers – now challenges the FCC's data roaming rule in this Court.

COUNTERSTATEMENT OF THE FACTS

I. STATUTORY AND REGULATORY BACKGROUND

1. Title III of the Communications Act of 1934, 47 U.S.C. §§ 301 *et seq.* ("the Act") grants the Commission broad authority to oversee radio transmission in the United States. Section 301 provides that "[i]t is the purpose of this [Act], among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." 47 U.S.C. § 301. To further that broad purpose, various provisions of section 303 of the Act authorize the FCC, subject to what the "public convenience, interest, or necessity requires," to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class,"[2] to "encourage the larger and more effective use of radio in the public

[2] 47 U.S.C. § 303(b).

interest,"[3] and to "prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this [Act]" in the public interest.[4] In addition, section 316 authorizes the FCC to modify existing licenses to impose new conditions on the licensee's operations if "such action will promote the public interest, convenience, and necessity, or the provisions of this [Act] . . . will be more fully complied with." 47 U.S.C. § 316(a).

To date, the Commission has exercised its Title III authority to allocate wireless communications spectrum for use on both a "common carrier" and "private carriage" basis. Common carriage historically involved the filing of tariffs, and prior review and approval of rates by the Commission, to ensure that they were cost-based and not discriminatory. *See Orloff v. FCC*, 352 F.3d 415, 419-20 (D.C. Cir. 2003) (describing traditional common-carrier regulation). In recent decades and with Congressional approval (*see* 47 U.S.C. § 332(c)(1)), the Commission determined that competitive market conditions allowed it to relax some of the traditional attributes of common-carrier regulation for wireless carriers, and it thus dispensed with tariffing

[3] *Id.* § 303(g).

[4] *Id.* § 303(r); *see also id.* § 309 (providing for conditions on the grant of spectrum licenses).

requirements and *ex ante* rate review. *Orloff*, 352 F.3d at 419. But the Commission has continued to enforce the core common-carrier requirements (set out in sections 201 and 202 of the Act, 47 U.S.C. §§ 201(b) and 202(a)) that rates and terms of common carriage wireless services must be just, reasonable and not unreasonably discriminatory. *Id.*, 352 F.3d at 419.

A common carrier that is eligible for regulatory flexibility may negotiate rates and terms with a particular customer, but the resulting rates and terms conform to common-carriage principles because the carrier must make them available to other similarly situated customers as well. *Competitive Telecomms. Ass'n v. FCC*, 998 F.2d 1058, 1063-64 (D.C. Cir. 1993). Thus, despite recent regulatory flexibility, the essential distinction between common carrier and non-common carrier services remains that the former are provided "indifferently" to all comers, while the latter are provided on the basis of "individualized decisions, in particular cases, whether and on what terms to deal." *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) ("*NARUC I*").

As required by Congress, the Commission's rules provide for common-carrier treatment of commercial mobile radio service, or "CMRS." 47 U.S.C. § 332(c)(1). CMRS is defined as a mobile service that is "provided for profit," "interconnected" to the public switched telephone network, and

available on a common carrier basis – *i.e.*, "[a]vailable to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public." 47 C.F.R. § 20.3; *see* 47 U.S.C. § 332(d)(1) (defining "commercial mobile service").

By contrast, "private mobile radio services" are mobile services that do not qualify as CMRS or "the functional equivalent" of CMRS. 47 C.F.R. § 20.3; *see also* 47 U.S.C. § 332(d)(3) (parallel definition of "private mobile service"). "A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier." 47 U.S.C. § 332(c)(2).

2. Roaming allows subscribers of one wireless carrier to use the network facilities of another "host" provider when making calls. *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817, 15819 (¶ 5) (2007) ("*2007 Order*"). Roaming is essential to wireless communications when the subscriber is outside the geographic reach of his or her provider's wireless towers and other network facilities. Pursuant to the Communications Act, the FCC has adopted policies designed to make roaming available to users of common-carrier CMRS almost since the advent of such services. These policies have contributed substantially to the expansion of wireless services to reach "more than 300

million mobile voice subscribers," virtually all of whom have "access to nationwide voice services and roaming." *Order*, 26 FCC Rcd at 5479 (Statement of Chairman Genachowski) (J.A.).

In 1981, the FCC adopted "manual" roaming requirements – under which the CMRS subscriber establishes a relationship directly with the roaming host provider (for example, by giving that provider a credit card number). *Order* ¶ 3 (J.A.) (citing *Cellular Report & Order*, 86 FCC 2d 469 (1981)). In 2007, the Commission stated that CMRS providers also had a common-carrier duty to provide "automatic" roaming services – which do not require subscribers to establish separate relationships with the host provider[5] – to other carriers upon just, reasonable and nondiscriminatory rates, terms, and conditions. *Order* ¶ 4 (J.A.) (citing *2007 Order*, 22 FCC Rcd at 15818 (¶ 1)). The FCC determined at that time that the manual and automatic roaming obligations applied, subject to certain technical specifications, to CMRS carriers' "real-time, two-way switched voice or data services . . . that are interconnected with the public switched network" ("interconnected roaming"). *Order* ¶ 4 (J.A.) (citing *2007 Order*, 22 FCC Rcd at 15837 (¶ 54)).

[5] With automatic roaming, the subscriber's own provider establishes a pre-existing contractual arrangement for roaming services with the host provider. *Order* ¶ 3 n.2 (J.A.).

Thus, before the *Order* on review, roaming obligations (1) applied only to interconnected services (principally roaming for wireless "voice" calls) and (2) consistent with the statutory classification of CMRS as common carriage, required that roaming be provided on the same terms to similarly situated customers. To implement this common-carriage obligation, the FCC further established a presumption (codified at 47 C.F.R. § 20.12(d)) that one wireless carrier's request for automatic interconnected roaming from another wireless carrier must be accommodated under sections 201 and 202 of the Act, 47 U.S.C. §§ 201 & 202, as long as the requesting carrier's network is technologically compatible with the host's network. *Order* ¶ 4 (J.A.) (citing *2007 Order*, 22 FCC Rcd at 15831 (¶ 33)).

II. THE *ORDER* ON REVIEW

1. *Data Roaming Requests for Comment*. At the same time it established automatic roaming obligations for *interconnected* services in 2007, the FCC also sought comment on whether it should adopt roaming requirements for *non-interconnected* data services – "including information services or other non-CMRS services offered by CMRS carriers." *Order* ¶ 6

(J.A.) (citing *2007 Order*, 22 FCC Rcd at 15845 (¶ 77)).[6] In 2010, the FCC sought further comment and a refreshed record on this issue.

Of the approximately two dozen interested parties that filed formal comments with the agency – including most major providers of mobile data services – only AT&T and Verizon opposed data roaming requirements. *Order* ¶ 12 (J.A.).

2. *Data Roaming Rule*. Based on the record compiled in response to the 2007 and 2010 requests for public comment, the FCC adopted a data roaming rule requiring facilities-based providers of commercial mobile data services to offer to negotiate individualized data roaming agreements with other such providers on commercially reasonable terms. *Order* ¶ 1 (J.A.).[7]

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[6] In 2007, the Commission concluded that mobile wireless broadband Internet access service (one of the core consumer services facilitated under carriers' data roaming arrangements) is not CMRS because "such broadband service is not an 'interconnected service.'" *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, 5917-18 (¶ 45) (2007) ("*2007 Wireless Broadband Order*") ("Mobile wireless broadband Internet access services do not 'give subscribers the capability to communicate to or receive communications from *all other users* on the public switched network.'") (quoting 47 C.F.R. § 20.3).

[7] A "commercial mobile data service" is "any mobile data service that is *not* interconnected with the public switched network but is (1) provided for profit; and (2) available to the public or to such classes of eligible users as to be effectively available to the public." *Order* ¶ 1 n.1 (J.A.) (emphasis added).

a. The FCC determined that a data roaming rule would "promote consumer access to seamless mobile data coverage nationwide;" "appropriately balance the incentives for new entrants and incumbent providers to invest in and deploy advanced networks across the country;" and "foster competition among multiple providers in the industry." *Order* ¶ 13 (J.A.).

These anticipated benefits were especially important because, with the rapid growth of smartphone usage, mobile data services were becoming "an increasingly significant part of the lives of American consumers," who "expect to be able to have access to the full range of services . . . wherever they go." *Order* ¶¶ 14, 15 (J.A.). Yet, the record indicated that the availability of data roaming arrangements would be critical to enabling consumers to have a competitive choice of facilities-based providers offering nationwide access to mobile data services. *Id.* ¶ 15 (J.A.). The FCC found, for instance, that without roaming service from the major carriers, consumers in rural areas – "where mobile data services may be solely available from small rural providers" – would lose mobile broadband access whenever they traveled outside their providers' small geographic license areas. *Id.* ¶ 15 & n.51 (J.A.). And even in areas served by large national networks, the FCC determined, the unavailability of data roaming arrangements could hamper

the competitive viability of smaller providers that might offer high-quality or low-cost service where they have a network, but would be unable to offer service of sufficient geographic scope to serve the needs of some customers. *Id.* ¶ 15 & n.52 (J.A.).

Rejecting claims by AT&T and Verizon that a data roaming rule was unnecessary because voluntary agreements will be reached without regulation, the FCC credited comments by numerous industry participants that they had "encountered significant difficulties obtaining data roaming arrangements on advanced '3G' data networks, particularly from the major nationwide providers." *Order* ¶ 24 (J.A.). The FCC found that, although AT&T had been offering retail 3G data services since 2005 and was providing coverage to 275 major metropolitan areas by May 2008, it did not enter into *any* data roaming agreements for that service until the FCC was days away from adopting a mandatory data roaming requirement. *Order* ¶ 25 (J.A.). Similarly, Verizon "had only nine [3G data] roaming agreements as of April 2010, even though its [3G] network ha[d] been in operation since October of 2003." *Id.* ¶ 26 (J.A.). The FCC noted that the major carriers' negotiation of a handful of roaming arrangements for data services after the FCC's 2010 request for comment on a data roaming rule "may have been the result of large providers seeking to defuse an issue under active Commission

consideration and may not accurately reflect the ability of the requesting providers to obtain roaming arrangements in the future" if the agency declined to adopt a data roaming rule. *Order* ¶ 27 (J.A.).[8]

The FCC further found that the benefits of a data roaming requirement would not be limited to meeting consumers' expectations. "[B]y ensuring that providers wanting to invest in their networks can offer subscribers a competitive level of mobile network coverage," a data roaming requirement also would "encourage investment in and deployment of broadband networks by multiple service providers, including large nationwide providers, regional providers and small providers." *Order* ¶ 16 (J.A.). The record showed that data roaming could be particularly critical during a provider's "early period of investment and buildout" in a market, because it enables the company to

[8] The FCC's prior experience gave it additional reason to doubt that data roaming agreements would be forthcoming in the absence of a rule. The FCC noted that, in 2007, it had declined to require carriers to provide interconnected roaming to requesting carriers in the requester's licensed service areas on the assumption that carriers would voluntarily negotiate such agreements while they built out their facilities within their areas of license. In 2010, however, the agency recognized that the exclusion "reduc[ed] the availability of home roaming arrangements" – and accordingly eliminated it. *Order* ¶ 27 (J.A.) (quoting *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 25 FCC Rcd 4181, 4195 (¶¶ 26, 28) (2010) (*"2010 Reconsideration"*)).

enter the market with "a competitive level of local coverage." *Id.* ¶ 18 (J.A.); *see also id.* ¶ 19 (J.A.) (citing record evidence).

Balanced against the substantial benefits of the data roaming rule – in the form of increased investment in broadband networks, increased competitive choice for consumers, and related benefits – such as lower prices, increased data usage, and incentives for providers to develop innovative data services, *Order* ¶¶ 28-31 (J.A.) – the FCC determined that any costs associated with the rule were relatively small, *id.* ¶ 32 (J.A.). The Commission stressed that "neither AT&T nor Verizon state that they would invest less under a roaming obligation," *id.* ¶ 33 (J.A.), and the rule allows roaming hosts to insist on terms that protect their networks against congestion or technically incompatible uses. *Id.* ¶ 35 (J.A.).

b. In adopting the new rule, the FCC expressly declined the request of several industry participants to impose a data roaming obligation as a common-carriage duty under Title II of the Communications Act, 47 U.S.C. §§ 201 *et seq*. *See Order* ¶ 70 (J.A.). Instead, the FCC required commercial mobile data service providers to *offer to negotiate* data roaming arrangements with other such providers. *Order* ¶ 1 (J.A.). The host provider is free to insist on any "commercially reasonable" term or condition for roaming that it thinks appropriate given the "individualized circumstances," and is *not*

required "to serve all comers indiscriminately on the same or standardized terms." *Order* ¶ 45 (J.A.). While providers may not engage in conduct that "unreasonably restrains trade," *id.*,[9] the Commission emphasized that it expected the flexible "standard of commercial reasonableness" to "accommodate a variety of terms and conditions in data roaming." *Order* ¶ 81 (J.A.); *see also id.* ¶¶ 68 (J.A.) ("providers will have flexibility with regard to roaming charges, subject to a general requirement of commercial reasonableness"), 78 (J.A.) ("duty to offer data roaming arrangements on commercially reasonable terms and conditions will allow for greater flexibility and variation in terms and conditions"). The agency emphasized that the *Order* does not subject covered providers to a common-carriage requirement of "just, reasonable and nondiscriminatory" rates, terms, and conditions. *Order* ¶ 68 & n.198 (J.A.).

The FCC specified other express freedoms allowed under the rule. The rule permits hosts to deny roaming to requesting providers either when those

[9] The Commission's analysis under the Communications Act and its implementing regulations is distinct from the analysis the Department of Justice would perform under the antitrust laws, and the rules at issue here should not be viewed as setting forth standards for determining whether particular conduct would violate the antitrust laws. For example, whether conduct "unreasonably restrains trade" in violation of the *Order* (*see* ¶¶ 45, 85 (J.A.)) is not determined by whether it would violate section 1 of the Sherman Act, 15 U.S.C. § 1.

providers are not technologically compatible, or when it is not technically or economically feasible to provide roaming in connection with the particular data service for which roaming is requested. *Id.* ¶¶ 43, 46-47 (J.A.). Responding to AT&T's concerns and rejecting requests by many commenters for a broader rule, *id.* ¶ 48 & nn. 135-137 (J.A.), the agency also specified that a host reasonably is allowed to condition the availability of a data roaming arrangement on the requesting provider's provision of mobile data service to its own subscribers using a generation of wireless technology comparable to that on which the requesting provider seeks to roam. *Id.* ¶¶ 43, 48 (J.A.). Finally, the FCC explained that host providers are free to negotiate "commercially reasonable measures to safeguard quality of service against network congestion that may result from roaming traffic or to prevent harm to their networks." *Id.* ¶ 52 (J.A.).

Under the new data roaming rule, enforcement is subject to case-by-case adjudication – either through complaint procedures that the FCC established, or through declaratory ruling proceedings. *Order* ¶ 75 (J.A.). The FCC determined, however, that because these enforcement procedures do not arise under sections 208 and 209 of the Act, 47 U.S.C. §§ 208 & 209 (which specifically provide for a damages remedy against common carriers), damages – which are available for violations of the interconnected roaming

rules – are not available for violations of the data roaming rule. *Order* ¶ 76 (J.A.). The FCC also declined to impose time limits for data roaming negotiations, finding that some negotiations may be more complex than others, and "[a] single time limit for all negotiations" therefore "would not be appropriate." *Id.* ¶ 84 (J.A.).

The FCC rejected the contentions of AT&T and Verizon that its data roaming requirements would violate the limitation in section 332(c)(2) of the Communications Act that "[a] person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this [Act]." 47 U.S.C. § 332(c)(2). The FCC found it unnecessary to decide whether some or all forms of data roaming are private mobile services subject to the common-carriage limitation.[10] This issue had no practical significance because, for reasons the agency explained in detail, the *Order* does not impose a common-carriage obligation. *See Order* ¶ 68 (J.A.) (the "data roaming rule[] we

[10] *See Order* ¶ 59 (J.A.) (noting MetroPCS's argument that data roaming is a pure common-carriage transmission service); *Reexamination of Roaming Obligations of Commercial Mobile Radio Services Providers and Other Providers of Mobile Data Services*, 25 FCC Rcd 4181, 4216-17 (¶ 68) (2010) ("*2010 Reconsideration*") (noting that the provision of roaming access to information services can involve either transmission of the packets to the roaming subscriber's native network or direct support of the information service by the host provider).

adopt do[es] not amount to treating mobile data service providers as 'common carriers' under the Act."). The FCC likewise rejected Verizon's contention that the rule violates the prohibition (now codified in 47 U.S.C. § 153(51)) against imposing common-carrier regulation on non-telecommunications services. *See Order* ¶¶ 60, 68 (J.A.).[11]

In that regard, AT&T and Verizon had argued to the FCC that their few existing data roaming agreements did *not* involve common carriage because they were not "'undertaking to carry for all people indifferently.'" *Order* ¶ 68 & n.197 (J.A.) (citing Verizon filing). Verizon, for instance, stressed in the agency's proceeding that it made "'individualized decisions, in particular cases, whether and on what terms to deal' with potential roaming partners."[12] And it described its voluntary, non-common carriage practice as a "*commercially reasonable*, market-based approach" that was "in no way intended to freeze out potential roaming partners." Verizon Reply Comments

[11] Like the dichotomy between CMRS (subject to common-carrier treatment) and "private mobile service" (not subject to such treatment), the Communications Act distinguishes between a "telecommunications service" (subject to common-carrier treatment) and an "information service" (not subject to such treatment). *See* 47 U.S.C. § 153(51), (53). The *2007 Wireless Broadband Order* classified mobile broadband Internet access as an "information service." 22 FCC Rcd at 5909-14 (¶¶ 19-34).

[12] Reply Comments of Verizon Wireless at 32 (July 12, 2010) (J.A.) (quoting Verizon Wireless Comments at 31-32 (June 14, 2010) (J.A.)).

at 32 n.102 (J.A.) (emphasis added). Similarly, AT&T stated that it did not offer data roaming on a common-carrier basis because it "does not have a standing roaming offer to all similarly situated providers, but rather negotiates specific contracts on an individualized, case-by-case basis."[13]

Pointing to the providers' own recognition that their "commercially reasonable" data roaming arrangements did not involve common carriage, the FCC explained why the *Order* similarly does not impose a common-carriage obligation:

> The rule we adopt will allow *individualized* service agreements and will *not require providers to serve all comers indifferently* on the same terms and conditions. Providers can negotiate different terms and conditions on an individualized basis, including prices, with different parties. The commercial reasonableness of terms offered to a particular provider may depend on numerous individualized factors . . . [and are not subject to] common carrier obligation[s] under Sections 201 and 202 of the Act. . . .

Order ¶ 68 (J.A.) (emphasis added).

The FCC identified express statutory authority for its data roaming requirement under Title III of the Communications Act. *Order* ¶¶ 62-64 (J.A.) (citing, *e.g.,* 47 U.S.C. §§ 301, 303, 309, 316, 1302). The underlying "public interest" standard, which applies to virtually all Commission actions under Title III, was also satisfied by, for example, facilitating consumer

[13] AT&T Inc. Comments at 19 (June 14, 2010) (J.A.).

access to ubiquitous wireless broadband service and encouraging investment in and buildout of advanced data services. *Order* ¶¶ 63-64 (J.A.).

Finally, the FCC rejected Verizon's contention that the data roaming rule unlawfully imposed either a physical or regulatory taking of the host provider's property. *Order* ¶ 69 (J.A.). The agency explained that "the issuance of an FCC license does not provide the licensee with any rights that can override the Commission's proper exercise of its regulatory power over the spectrum." *Id.* In any event, there could be no takings violation because an opportunity to obtain "just" compensation is guaranteed under the "commercially reasonable" standard embedded in the data roaming rule. *Id.*

SUMMARY OF ARGUMENT

1. The FCC's interpretation of the Communications Act is subject to review under the deferential standards of *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984), which apply to an administrative agency's construction of its governing statute, including interpretive questions that implicate the agency's jurisdiction. *Transmission Agency of N. California v. FERC*, 495 F.3d 663, 673 (D.C. Cir. 2007).

2.a. The FCC properly adopted the *Order* pursuant to Title III of the Communications Act, which directs the Commission to condition and modify radio licenses in order to manage spectrum in the public interest. *Order*

¶¶ 61-64 (J.A.) (citing, *e.g.*, 47 U.S.C. §§ 303(b), 303(g), 303(r), 309, 316). Those sections, which also supplied the statutory basis for voice roaming rules dating back to the 1980s, give the Commission "expansive" powers and a "comprehensive" mandate, *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943), which "limits the practical scope of responsible judicial review," *Schurz Commc'ns, Inc. v. FCC*, 982 F.2d 1043, 1048 (7th Cir. 1992).

Verizon contends (Br. 19, 24-41) that the data roaming requirement nevertheless violates specific statutory prohibitions – contained in 47 U.S.C. §§ 153(51) and 332(c)(2) – against common-carrier regulation of non-CMRS services and information services. That argument is misdirected because the Commission *declined* to impose common-carrier obligations on host providers of data roaming services. *Order* ¶ 68 (J.A.). The data roaming rule does "not require [host] providers to serve all comers indifferently on the same terms and conditions," a requirement that Verizon itself described as the "*sine qua non"* of common-carrier treatment. *Id.* ¶ 68 & n.197 (J.A.). Indeed, the Commission's rule contemplating individually negotiated data roaming agreements on commercially reasonable terms "tailored to individualized circumstances," *id.* ¶ 45 (J.A.), sounds very much like Verizon's description of its voluntary data roaming practices before the *Order*

– which Verizon cited as proof that data roaming need not be common carriage. *See* Verizon Reply Comments at 32 & n.102 (J.A.).

Nor is there any merit to Verizon's argument that the data roaming rule for non-interconnected wireless services imposes a requirement that is substantially identical to the common-carrier obligation of just, reasonable and nondiscriminatory rates and terms that has long been applicable to providers of interconnected CMRS (including voice services). The *Order* makes clear that providers may negotiate for any individualized terms for data roaming that are within the broad bounds of commercial reasonableness – a standard that permits the Commission to consider numerous factors, including whether the potential host's position is "tantamount to a refusal to offer data roaming" or "unreasonably restrains trade," but does not require the host to treat similarly situated providers the same. *Order* ¶¶ 85, 86 (J.A.); *accord id.* ¶ 45 (J.A.). By contrast, a common-carriage requirement obligates the provider to make like services available to all similarly situated customers on equivalent terms. *Competitive Telecomms. Ass'n v. FCC*, 998 F.2d at 1063-64. Verizon's suggestion (Br. 37-41) that the Commission, in adjudicating data roaming disputes, will impose common-carriage requirements notwithstanding the agency's express statement to the contrary (*Order* ¶ 68 (J.A.)) is unripe and, in any event, meritless..

b. Even if the data roaming requirement did impose a common-carriage requirement, which it does not, the rule would be authorized by section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302. *See Order* ¶ 64 (J.A.). The common-carriage limitations in sections 153(51) and 332(c)(2) only apply to common-carrier treatment under the Communications Act of 1934, as amended. Section 706 is not part of the Communications Act and thus is not subject to those limitations.

c. The data roaming rule does not "raise a substantial takings issue" that would warrant a narrowing construction of the FCC's statutory authority under *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994). The *Bell Atlantic* rule only applies to *per se* takings, such as permanent physical occupations of a provider's property, and is premised on the assumption that a taking would expose the public fisc to a claim for compensation. *Bldg. Owners and Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 99 (D.C. Cir. 2001). Data roaming involves delivery of electronic signals, which is not a physical taking. *Cablevision Sys. Corp. v. FCC*, 570 F.3d 83, 98 (2d Cir. 2009). And the availability of commercially reasonable compensation under negotiated data roaming agreements eliminates any possibility of government liability even if a taking were to occur.

3. Finally, Verizon's perfunctory attack (Br. 56-59) under the deferential arbitrary-and-capricious standard of the Administrative Procedure Act ("APA") similarly fails. The treatment of data roaming as non-common carriage poses no unexplained departure from the Commission's prior decisions to treat roaming for interconnected CMRS as common carriage. In determining the need for a data roaming rule, the *Order* cited record evidence that many wireless providers were encountering "significant difficulties [in] obtaining data roaming arrangements," particularly from AT&T and Verizon. *Order* ¶¶ 24-27 (J.A.). Verizon provides no basis for concluding that the Commission abused its broad discretion in predicting that the new rule will benefit the public. *Order* ¶¶ 28-36 (J.A.).

ARGUMENT

The Commission's data roaming rule differs fundamentally from the common-carriage rule many wireless providers supported, and AT&T and Verizon opposed, in the agency's proceeding.[14] For its part, Verizon now finds it necessary to take the litigation position that the Commission will give wireless providers less operational freedom than the Commission has clearly said it will allow. Indeed, Verizon challenges a rule the Commission did not

[14] AT&T has not joined Verizon's judicial challenge to the rule.

adopt. Because Verizon's challenges are inconsistent with both the relevant facts and the relevant law, they should be rejected.

I. DEFERENTIAL STANDARDS OF REVIEW APPLY IN THIS CASE

1. Review of the FCC's interpretation of provisions of the communications laws – including the applicability of common carriage principles under those laws – is governed by *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984). *See, e.g., U.S. Telecom. Ass'n v. FCC*, 295 F.3d 1326, 1332 (D.C. Cir. 2002). If the intent of Congress is clear from the statutory language, "that is the end of the matter." *Chevron*, 467 U.S. at 842-843. But if the statutory language does not reveal the "unambiguously expressed intent of Congress" on the "precise question" at issue, *id.*, the Court must accept the agency's interpretation as long as it is reasonable and "is not in conflict with the plain language of the statute." *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992). Judicial deference is particularly appropriate where, as here, the interpretive questions implicate the FCC's judgment under the statutory "public interest, convenience, and necessity" standard, because "Congress has delegated" that judgment "to the Commission in the first instance." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (internal quotation marks omitted).

"In determining whether [an agency] has acted beyond its jurisdiction, [this Court] grant[s] [the agency] *Chevron* deference." *Transmission Agency of N. California*, 495 F.3d at 673 (citation omitted). Verizon claims otherwise (Br. 22-23, 27-28 n.7), relying on *American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005), but that case says no such thing. In *American Library Association*, the Court explicitly "appl[ied] the familiar standards of review enunciated . . . in *Chevron*." *Id.* at 698. Although the Court ultimately determined that the FCC had not "acted pursuant to delegated authority" and, accordingly, was due no interpretive deference in that instance, *id.* at 699, it did so not because jurisdictional statutes are subject to a heightened standard of review, but because, in the circumstances of that case, the agency's reading of the Communications Act was foreclosed by the *plain meaning* of the statutory text. *Id.* at 700; *see also Transmission Agency of N. California*, 495 F.3d at 673 (describing *American Library Association* as a case decided under *Chevron* Step 1).

2. Verizon's contentions (Br. 56-59) that the FCC acted arbitrarily and capriciously in violation of the APA are likewise reviewed under a highly deferential standard. Under that standard, the Court "presume[s] the validity of the Commission's action and will not intervene unless the Commission failed to consider relevant factors or made a manifest error in judgment."

Consumer Electronics Ass'n v. FCC, 347 F.3d 291, 300 (D.C. Cir. 2003). Moreover, where the FCC's decision "rest[s] on judgment and prediction rather than pure factual determinations," "complete factual support for the [FCC's] ultimate conclusions is not required, since a forecast of the direction in which [the] future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *WNCN Listeners Guild*, 450 U.S. at 594-95 (internal quotation marks omitted).

II. THE DATA ROAMING RULE IS WITHIN THE FCC'S STATUTORY AUTHORITY

A. The FCC Correctly Determined That The Data Roaming Rule Is Within Its Authority Under The Communications Act.

The FCC determined that multiple provisions in Title III of the Communications Act empowered it to adopt its data roaming rule in service of an array of evident public interest benefits, including the promotion of competition and investment in mobile broadband services and ubiquitous consumer access to such networks and services. *Order* ¶¶ 62-67 (J.A.) (citing, *e.g.*, 47 U.S.C. §§ 303(b), 303(g), 303(r), 309, 316). The "public interest" standard – a component of all of the Title III provisions on which the FCC relied – "invests the Commission with an enormous discretion and correspondingly limits the practical scope of responsible judicial review." *Schurz Commc'ns*, 982 F.2d at 1048. *Accord WNCN Listeners Guild*, 450

U.S. at 593. Not surprisingly, therefore, Verizon's primary challenge to the data roaming rule is that the *Order* conflicts with an express, but narrow, statutory prohibition – the prohibition on common-carriage treatment contained in 47 U.S.C. §§ 332(c)(2) and 153(51). Verizon Br. 27-41. As we explain below, Verizon's claim fails because the *Order* does not impose a common-carriage obligation.

1. The Data Roaming Requirement Does Not Impose A Common-Carriage Obligation On Host Providers.

a. The FCC emphasized that its data roaming requirement does "not require [host] providers to serve all comers indifferently on the same terms and conditions," *Order* ¶ 68 & n.198 (J.A.). As Verizon itself argued before the FCC, this is the "'*sine qua non*'" of common carrier treatment. Letter from John T. Scott, Verizon, to FCC Secretary, at 3 (Mar. 30, 2011) (J.A.) (quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) ("*NARUC II*")); *see also* Verizon Br. 29 ("the hallmark of common carriage is 'a duty to hold out facilities indifferently for public use.'") (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 n.16 (1979) ("*Midwest Video II*")); *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) ("[T]he indiscriminate offering of service on generally applicable terms . . . is the traditional mark of common carrier service.").

"A common carrier does not 'make individualized decisions, in particular cases, whether and on what terms to deal.'" *Midwest Video II*, 440 U.S. at 701 (quoting *NARUC I*, 525 F.2d at 641). Thus, as this Court has put the matter, "[i]f the carrier chooses its clients on an individual basis and determines in each particular case 'whether and on what terms to serve' and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service." *Sw. Bell Tel. Co.*, 19 F.3d at 1481 (quoting *NARUC II*, 533 F.2d at 608-09).

The *Order* only requires host providers to offer to enter into "individually negotiated data roaming arrangements with commercially reasonable terms and conditions." *Order* ¶ 68 (J.A.). The terms and conditions for which the potential host bargains may be "tailored to individualized circumstances without [hosts] having to hold themselves out to serve all comers indiscriminately on the same or standardized terms." *Id.* ¶ 45 (J.A.). Verizon acknowledged before the agency that the type of arrangement ultimately required in the *Order* "decidedly [is] *no[t]*" common carriage. Verizon Reply Comments at 32 (J.A.) (emphasis added). *See id.* & n.102 (J.A.) (asserting that it employed a "commercially reasonable, market based approach" to data roaming, which "is in no way intended to freeze out potential roaming partners" but involves "individualized decisions,

in particular cases, whether and on what terms to deal"). Consistent with Verizon's former position, the Commission concluded that the data roaming rule – which relies on a "commercially reasonable" approach that allows for "individualized decisions" – "do[es] not treat mobile data service providers as 'common carriers' under the Act," *Order* ¶ 68 (J.A.).

That reasonable Commission determination is entitled to deference. *See U.S. Telecom. Ass'n v. FCC*, 295 F.3d at 1332 (according the FCC deference in interpreting and applying common-carriage status under the Communications Act); *AT&T v. FCC*, 572 F.2d 17, 24 (2d Cir. 1978) (same).[15] Indeed, even apart from the deference due to the agency's reasonable determination, the same conclusion would follow if this Court were to address the question *de novo*.

Because it allows hosts to insist upon commercially reasonable terms "tailored to individualized circumstances, without having to hold themselves

[15] Verizon asserts, contrary to this precedent, that the Commission is entitled to no deference in its determination that the data roaming requirement does not impose common carriage, because "'[t]he common law definition of common carrier is sufficiently definite as not to admit of agency discretion.'" Br. 37-38 n.7 (quoting *NARUC I*, 525 F.2d at 644). The Court in *NARUC I*, however, was merely "reject[ing] those parts of the [FCC] Orders [that] impl[ied] *unfettered* discretion in the Commission to confer or not confer common carrier status on a given entity." *NARUC I*, 525 F.2d at 644 (emphasis added). Here the Commission claims no such "unfettered discretion," and nothing in *NARUC I* undermines the routine application of *Chevron* deference to the agency's interpretations of its governing statute.

out to serve all comers indiscriminately on the same or standardized terms," *Order* ¶ 45 (J.A.), the *Order* does not compel "whether and on what terms to serve" customers, *NARUC II*, 533 F.2d at 608-09, and contains "no specific regulatory compulsion to serve all indifferently," *Sw. Bell Tel. Co.*, 19 F.3d at 1481. Accordingly, the individualized arrangements contemplated by the *Order* are the antithesis of common carriage. *See, e.g., Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 925 (D.C. Cir. 1999) (upholding FCC decision to treat provider of submarine fiber optic cable systems as a non-common carrier where it "would have to engage in negotiations with each of its customers on the price and other terms which would vary depending on the customers' capacity needs, duration of the contract and technical specifications"); *Sw. Bell Tel. Co.*, 19 F.3d at 1481 (concluding that provider's dark fiber offerings, which were "individually tailored arrangements negotiated to last for periods of five to ten years," were not common-carrier services); *NARUC I*, 525 F.2d at 643 (upholding FCC classification of certain special mobile service systems as private carriage where providers would "negotiate with and select future clients on a highly individualized basis.").

b. Verizon contends (Br. 30-32) that the *Order* deprives host providers of "discretion over whether and with whom to deal," and that supposed

feature of the *Order* – "standing alone" – compels the conclusion that the FCC imposed an impermissible common-carrier requirement. Verizon is wrong.

Verizon reads out of the concept of common carriage its defining attribute – the duty to hold out facilities "indifferently," *Midwest Video II*, 440 U.S. at 707 n.16, or "indiscriminate[ly]," *Sw. Bell Tel. Co.*, 19 F.3d at 1481 – *i.e.*, on nondiscriminatory terms. If Verizon were correct that any restriction of a provider's discretion over "whether and with whom to deal" is "standing alone" (Br. 32) enough to create a common-carriage obligation, it would make no sense for courts to focus on the terms ultimately offered by the provider – *i.e.*, whether the same offering is made available "indifferently" or "indiscriminate[ly]" to all potential customers who want it. *See Midwest Video II*, 440 U.S. at 701 (focusing on whether "individualized decisions" are made in "particular cases," including "whether *and on what terms* to deal") (quoting *NARUC I*, 525 F.2d at 641) (emphasis added); *Sw. Bell Tel. Co*., 19 F.3d at 1481 ("whether *and on what terms* to serve") (quoting *NARUC II*, 533 F.2d at 608-09) (emphasis added).

Supreme Court precedent further makes clear that not every regulatory limitation on the terms and conditions of providing a communications service involves a common-carriage mandate. If non-common carriers were entitled

to absolute discretion over who may use their communications networks and for what purposes, then the cable television rules that the Supreme Court upheld in *United States v. Sw. Cable Co.*, 392 U.S. 157 (1968), and *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) ("*Midwest Video I*"), as valid exercises of the FCC's statutory authority over broadcasting, would have been invalidated on the basis that they imposed impermissible common-carrier obligations.[16] The rules challenged in *Southwestern Cable*, among other things, required cable systems to carry, upon request, "the signals of broadcast stations into whose service area they brought competing signals," and to avoid same-day duplication of local broadcast station programming on another channel. *Midwest Video I*, 406 U.S. at 659 (plurality opinion). The rules challenged in *Midwest Video I* required cable operators, in addition to carrying broadcast signals, to devote a portion of their facilities to providing original "cablecast" programming. 406 U.S. at 652-54. Both sets of rules limited cable operators' discretion regarding who could use their systems and

[16] The Communications Act prohibits broadcast licensees from being treated as common carriers. 47 U.S.C. § 153(11). At the time of the *Midwest Video* cases, cable regulations rested on the FCC's authority to regulate broadcasting. *See Midwest Video II*, 440 U.S. at 703-09; *see also Order* ¶ 65 (JA). Accordingly, the statutory prohibition on common-carrier treatment of broadcasters applied to cable regulation and was the basis for the Court's invalidation of certain cable access rules in *Midwest Video II*. 440 U.S. at 700.

what could be carried over them, and both were upheld, notwithstanding the statutory prohibition on treating broadcasting as common carriage.

To the same effect, in *Midwest Video II*, the Supreme Court held that the fairness doctrine, which required broadcasters to provide fair coverage of each side of a public issue, did not mandate common carriage because – just like the data roaming requirement – it preserved "a wide range of licensee discretion." 440 U.S. at 705 n.14.

The portion of *Midwest Video II* on which Verizon relies (Br. 27-30) involved very different circumstances. Because the public-access rules struck down there required cable systems "to hold out dedicated channels on a *first-come, nondiscriminatory* basis," the Government reasonably conceded that they could be viewed as a form of "common carriage-type" regulation. 440 U.S. at 701-02 (emphasis added); *see also Order* ¶¶ 65, 68 n.203 (J.A.). By contrast, the *Order*'s data roaming requirement calls for individually negotiated arrangements and does "not require [host] providers to serve all comers indifferently on the same terms and conditions." *Order* ¶ 68 (J.A.).

Verizon notes that the public access rules struck down in *Midwest Video II* "restricted what operators could 'charge for the privileges of access and use of facilities and equipment.'" Br. 28 (quoting *Midwest Video II*, 440 U.S. at 694). But regulatory review of pricing cannot be the dividing line

between common and private carriage. The Communications Act, for instance, contemplates FCC regulation of cable rates, 47 U.S.C. § 543, notwithstanding an express statutory prohibition on regulation of cable systems as common carriers "by reason of providing any cable service," *id.* § 541(c).[17]

c. Verizon also points to *Orloff v. FCC*, 352 F.3d 415, 418-20 (D.C. Cir. 2003), and *Iowa Telecomms. Servs. v. Iowa Utils. Bd.*, 563 F.3d 743, 750 (8th Cir. 2009), in which this Court and the Eighth Circuit found that individually negotiated contracts can in some instances co-exist with common-carrier status. In *Orloff*, section 332(c) required that CMRS carriers be treated as common carriers subject to the prohibition in section 202(a) against unreasonable discrimination, and the Court agreed with the FCC and Verizon (as intervenor) that the Commission could lawfully rely on market forces to ensure compliance with that statutory requirement. *See* 352 F.3d at

[17] Of course, the imposition of federal price controls at various times during the 20th Century – including World War II, the Korean War, and the early 1970s – did not convert all covered service providers into common carriers during those periods.

419-21.[18] By contrast, in the data roaming *Order*, the FCC expressly "*reject[ed]* – rather than determine[d] how to enforce – [the] common carriage requirement" of just, reasonable and nondiscriminatory rates, terms, and conditions. *Order* ¶ 68 n.198 (J.A.).

Similarly, in determining that a telecommunications provider was a common carrier notwithstanding individually negotiated contracts with customers, the Eighth Circuit in *Iowa Telecommunications Services* relied on the fact that, unlike data roaming host providers here (*Order* ¶ 68 n.198 (J.A.)), the provider at issue "self-certified that it is a common carrier" and "ma[de] public its intent to act as a common carrier" for the services at issue. 563 F.3d at 749.[19] As a result, and unlike data roaming hosts, the provider in

[18] Dicta in *Orloff* describe Verizon's challenged practice as the "offer[ing of] concessions to some customers and not others, even though there is no discernable difference between the two groups." 352 F.3d at 420-21. But Verizon explained that it "made concessions in a nondiscriminatory manner" because "[a]ll customers … would be equally likely to be offered or not offered a concession" in the competitive Cleveland voice services market at issue. *Orloff v. Vodafone Airtouch Licenses LLC, D/B/A Verizon Wirless*, 17 FCC Rcd 8987, 8995 (¶ 16) (2002), *aff'd Orloff v. FCC*, 352 F.3d 415 (D.C. Cir 2003).

[19] *NARUC II*, which Verizon cites (Br. 38) for the proposition that "'preferential rate structures' amounting to 'price discrimination' did not defeat common-carrier status," involved rules that generally required cable systems to offer "first-come, nondiscriminatory access" to their leased access channels. 533 F.2d at 609. By contrast, the *Order* imposes no such "first-come, *nondiscriminatory* access" requirement on host providers.

Iowa Telecommunications Services had an obligation to make its individually negotiated offerings available to similarly situated customers. 563 F.3d at 750 & n.6.

Verizon identifies no case in which a carrier such as Verizon that seeks to enter into individualized arrangements and does not wish to provide a common-carriage service on generally available terms, and is supported in that desire by its regulator, has been deemed by a court to be a common carrier.

d. Verizon next contends that roaming for commercial mobile data services must involve a common-carrier obligation because the FCC has stated that "automatic roaming" for voice and other interconnected services is "a common carrier obligation pursuant to Sections 201 and 202 of the Communications Act." Br. 35 (quoting *2007 Order*, 22 FCC Rcd at 15824 (¶ 18)); *see also 2010 Reconsideration*, 25 FCC Rcd at 4213 (¶ 64) (noting that "the Commission found that automatic roaming is a common carrier obligation"). Verizon has mischaracterized the agency's orders.

The FCC has never said in any decision that all forms of roaming – including the data roaming rule just recently adopted – is inherently common carriage. Rather, the older decisions cited by Verizon were describing Rule 20.12(d) – a rule that requires roaming for interconnected services to be

provided "to any technologically compatible, facilities-based CMRS carrier on reasonable and not unreasonably discriminatory terms and conditions, *pursuant to Sections 201 and 202 of the Communications Act,*" 47 C.F.R. § 20.12(d) – and stressed that roaming, "as a common carrier obligation" under its rules, "d[id] *not* extend to" non-interconnected services. *2007 Order*, 22 FCC Rcd at 15819 (¶ 2) (emphasis added). Indeed, while Verizon generally miscasts roaming as an undifferentiated obligation that invariably entails common-carrier treatment, *see, e.g.*, Br. 16, 35, it ultimately admits that "the FCC classified roaming as a common-carrier obligation *in the particular context of voice services*," *id.* at 35 (emphasis added) – *i.e.*, those services for which the FCC imposed a classic common-carriage obligation not to impose unreasonably discriminatory rates, terms, and conditions pursuant to Title II of the Communications Act.

Accordingly, the FCC did not act inconsistently with its prior precedent by creating a non-common carrier roaming obligation applicable to non-interconnected data services that are not subject to the agency's preexisting rules for voice and other interconnected services.

e. Nor is there any merit to Verizon's claim that the "commercially reasonable terms" standard adopted in the *Order* is, in substance, identical to

the common-carriage requirement of just, reasonable and non-discriminatory rates, terms, and conditions. Br. 33-37.

The roaming rule that the FCC previously adopted for voice and other interconnected services expressly applies the common-carriage standards of sections 201(b) and 202(a) – just, reasonable and nondiscriminatory rates, terms, and conditions, *see* 47 C.F.R. § 20.12(d) – while the data roaming rule does "*not* require providers to serve all comers indifferently on the same terms and conditions," *Order* ¶ 68 (J.A.); *see also* ¶ 68 n.198 ("we here *reject*—rather than determine how to enforce—a common carriage requirement of 'just and reasonable' rates, terms, and conditions"). Unlike the common-carriage context, where providers are obligated to offer the same terms to a similarly situated requesting party, the Commission emphasized that the "commercially reasonable" standard applicable to data roaming agreements will allow for considerable flexibility in negotiating terms with wide room for variation. *See, e.g.*, *Order* ¶¶ 68 (J.A.) ("providers will have flexibility with regard to roaming charges, subject to a general requirement of commercial reasonableness"), 78 (J.A.) ("duty to offer data roaming arrangements on commercially reasonable terms and conditions will allow [for] greater flexibility and variation in terms and conditions"), 81 (J.A.)

("the standard of commercial reasonableness is one that we expect to accommodate a variety of terms and conditions in data roaming").

Reflecting the considerable leeway that hosts have to agree upon individualized terms for data roaming, the *Order* lists factors the Commission may consider in determining the commercial reasonableness of the particular negotiating position at issue. In contrast to the "similarly situated" framework that applies to common carriage, these factors include broader and more flexible considerations such as the impact of the roaming terms and conditions on investment incentives, whether the parties already have roaming arrangements (including for interconnected services) with each other, whether other potential roaming partners are available, and whether the potential host's position "[is] tantamount to a refusal to offer . . . data roaming" or "unreasonably restrains trade." *Order* ¶¶ 85, 86 (J.A.); c*ompare Competitive Telecomms. Ass'n v. FCC*, 998 F.2d at 1063-64 (a common-carriage requirement obligates the provider to make like services available to *all* similarly situated customers on equivalent terms). Because the rule for commercial data roaming allows service to be provided exclusively pursuant to individually negotiated agreements on "commercially reasonable terms and conditions tailored to individualized circumstances," and does not require that such agreements be made available to similarly

situated customers, it does not compel common carriage. *See Order* ¶ 45 (J.A.) (noting that hosts will not "hav[e] to hold themselves out to serve all comers indiscriminately on the same or standardized terms").

Verizon contends that the Commission in effect imposed a requirement of indiscriminate service by stating, when discussing enforcement of the new rule, that "[a]s discussed above, providers can negotiate different terms and conditions, including prices, with different parties, where differences in terms and conditions reasonably reflect actual differences in particular cases." Br. 32-33 (quoting *Order* ¶ 85 (J.A.)). Not so. The quoted statement expressly does not define the "commercial reasonableness" standard and merely indicates that, in an administrative proceeding where the Commission is asked to enforce the substantive standard of "commercially reasonable terms," the FCC will consider, among many factors (*see Order* ¶ 86 (J.A.)), the host's reason for declining a request for treatment similar to that accorded to another requesting provider and whether that proffered reason has a basis in fact. *Order* ¶ 85 (JA). Unlike enforcement of common-carrier requirements, in which the Commission evaluates potentially discriminatory conduct under common law and statutory precedent, the focus in a data roaming enforcement proceeding would be whether the provider's conduct in negotiations was within the bounds of legitimate commercial considerations,

and the impact of that conduct on competition and consumers. *Order* ¶¶ 68, 86 (JA).

Indeed, it is not difficult to conceive of terms that would be commercially reasonable but nonetheless would violate the classic common-carrier requirement of just, reasonable and nondiscriminatory rates, terms, and conditions. Consider, for example, a situation where a host offers a 20% discount to the first roaming partner that successfully negotiates an agreement, but declines the discount to all later requesters. Such a position would involve discriminatory rates in violation of common–carriage rules[20] – but likely would be justified under the commercial reasonableness standard, so long as the host is not "freez[ing] out [other] potential roaming partners." *See* Verizon Reply Comments at 32 n.102 (J.A.) (denying the existence of such a company policy).

The data roaming rule also differs substantially from the roaming rules applicable to CMRS (*i.e.*, voice and other interconnected services) in that the CMRS rules "presume that a request by a technologically compatible CMRS carrier for automatic roaming is reasonable [and thus must be honored]

[20] *See, e.g., American Trucking Ass'n v. FCC*, 377 F.2d 121, 130-34 (D.C. Cir. 1966) (affirming FCC order prohibiting unreasonably discriminatory discounted service); *Western Union Int'l v. FCC*, 568 F.2d 1012, 1017-19 (2d Cir. 1977) (same).

pursuant to Sections 201 and 202 of the Communications Act." 47 C.F.R. § 20.12(d); *see also 2007 Order*, 22 FCC Rcd 15817 (¶ 33) (discussing presumptions under CMRS automatic roaming rule). Verizon's unsupported assertion notwithstanding, *see* Br. 19, the data roaming rule imposes no comparable presumption. It creates an obligation to "offer" a commercially reasonable arrangement to an eligible requesting provider, but adopts no presumption one way or the other regarding the reasonableness of any request or resulting offer. *See* 47 C.F.R. § 20.12(e). Indeed, even the duty to "offer" a data roaming arrangement is subject to "specified limitations, such that a host provider may not have an obligation to offer data roaming arrangements to a requesting provider." *Order* ¶ 80 n.237 (J.A.); *see id.* ¶¶ 43, 46, 47 (J.A.).

Verizon finally relies on the similarity between some factors that inform the FCC's analysis of whether hosts have complied with voice and data roaming obligations to argue that those obligations are "essentially the same." Br. 36. But an "overlap[]" (Verizon Br. 36) in the issues the Commission may consider in determining compliance with two different substantive standards (*e.g.*, whether alternative roaming partners are available) does not make the standards one and the same.

Nor is Verizon's position advanced by its observation that some limitations on the data roaming obligation (for instance, that roaming need not be negotiated where the providers' networks are technologically incompatible or roaming is technically infeasible) "mirror" similar limitations on the voice roaming requirement. Br. 37. These limitations are protections for the host provider, not obligations it incurs. Thus, the overlap ensures wireless data providers every measure of flexibility accorded wireless voice providers – *plus the additional flexibility of being able to negotiate customized arrangements as non-common carriers*.

Verizon ultimately falls back to a purely rhetorical assertion (Br. 39) that the FCC will not apply the *Order* as written, and differences between commercial reasonableness under the data roaming rule and the common carrier standards of sections 201 and 202 will prove to be a "linguistic shell game." In this facial challenge to the data roaming rule, Verizon provides no basis to question the agency's clear statement that it will not apply the common-carrier standard in ruling on data roaming disputes. *See Lichoulas v. FERC*, 606 F.3d 769, 779 n.8 (D.C. Cir. 2010) (noting the "well-settled presumption of administrative regularity") (citations omitted). Because such disputes will be decided "on a case-by-case basis," *Order* ¶ 85 (J.A.), Verizon could bring an as-applied challenge to any future application of the

data roaming rule that departed from the *Order* and actually did mandate common carriage in a particular situation. Its current claim that, contrary to the *Order*'s express terms, the Commission will impose common-carriage requirements on host providers is therefore unripe. *See Sprint Corp. v. FCC*, 331 F.3d 952, 956 (D.C. Cir. 2003) ("where the agency retains substantial discretion to implement its decision, the decision is not ripe until it has been implemented in particular circumstances"); *compare Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 715 (D.C. Cir. 2011) (finding claim to be ripe because "petitioners' claims rest[] not on the assumption that the [Commission] will exercise its discretion unlawfully in applying the regulation but on whether its *faithful* application would violate the law") (internal quotation markets omitted).

2. Specific Grants of Authority In The Communications Act Expressly Authorize The FCC To Manage Spectrum And To Impose Conditions On Licenses To Further The Public Interest, Convenience, And Necessity.

Stripped of its mistaken claim that the *Order* imposes an impermissible common-carriage requirement, Verizon is left to argue that the FCC's mandate under Title III of the Communications Act is limited to "technical issues" concerning the classification of stations by service type, the assignment of stations to particular frequency bands, power limits, and the

avoidance of interference. Br. 46. Verizon's cramped reading of the Commission's authority finds no support in the statute or governing precedent.

First, the Supreme Court long ago made clear that "[t]he [Communications] Act itself establishes that the Commission's [Title III] powers are not limited to the engineering and technical aspects of radio communication." *NBC*, 319 U.S. at 215 (upholding FCC regulations limiting competitively restrictive chain broadcasting practices). Among the provisions establishing this principle are section 303(g), which directs the FCC to "'encourage the larger and more effective use of radio in the public interest'" and section 303(r), which empowers the FCC "to adopt 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.'" *Id.* at 217 (quoting 47 U.S.C. §§ 303(g) & (r)). Those provisions provide "expansive" powers and a "comprehensive" mandate, 319 U.S. at 219, and refute Verizon's long-rejected premise that the FCC is simply "a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other," *id.* at 215.

Verizon is also wrong in claiming that the data roaming rule is unrelated to Congress's grants of regulatory authority under Title III. In

adopting the rule, the FCC relied upon the same "expansive" and "comprehensive" section 303(g) & (r) grants of authority discussed in *NBC*, finding that data roaming obligations would help "ensure that spectrum is being put to its best and most efficient use." *Order* ¶¶ 62 n.172, 64 n.178 (J.A.). The FCC also found authority for its data roaming rule in section 303(b), which directs the FCC, consistent with the public interest, to "'[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class.'" *Order* ¶ 62 & n.173 (J.A.) (quoting 47 U.S.C. § 303(b)). And the agency reasonably predicted (*see Order* ¶ 63 (J.A.)) that the data roaming requirement will advance the objectives of section 309, which, among other things, directs the Commission to encourage "(A) the development and rapid deployment of new technologies, products, and service for the benefit of the public . . . without administrative or judicial delays . . . [and] (D) efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. § 309(j)(3).

Finally, the FCC stressed that its authority to advance these public interest goals does not evaporate at the time a license is granted, but extends to the modification of existing licenses. *Order* ¶ 62 (J.A.) (citing 47 U.S.C. § 316). Section 316(a)(1) provides that "[a]ny station license or construction permit may be modified by the Commission either for a limited time or for

the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity." Precedent confirms that this authority to effect modifications may be exercised through general rulemaking proceedings "based upon the general characteristics of an industry," and not in licensee-specific adjudications.[21]

Verizon suggests in passing that section 303(b) of the Communications Act authorizes the FCC only to place *limitations* on services offered over radio facilities and does not empower the agency affirmatively to require the provision of any service. Br. 49. The cases upon which Verizon relies do not support that proposition. Those cases acknowledge the FCC's power to impose limitations on services pursuant to section 303(b), but none states or even suggests that the Commission's authority under that section is confined to defining service limitations. In any event, the data roaming rule simultaneously defines the affirmative obligation of covered host providers and limits their authorized uses of their FCC-licensed spectrum by requiring them to comply with the rule adopted in the *Order*.

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[21] *Order* ¶ 62 & n. 171 (J.A.) (citing, *e.g.*, *Cmty. Television, Inc. v. FCC*, 216 F.3d 1133, 1140 (D.C. Cir. 2000); *WBEN, Inc. v. FCC*, 396 F.2d 601, 617-18 (2d Cir. 1968); *California Citizens Band Ass'n v. U.S.*, 375 F.2d 43, 50-52 (9th Cir. 1967)). *See also Celtronix Telemetry, Inc. v. FCC*, 272 F.3d at 589 ("[I]t is undisputed that the [FCC] always retained the power to alter the term of existing licenses by rulemaking.").

Nor does the data roaming rule "regulate the business" of wireless broadband providers or "determine the validity of [their] contracts" with third parties in a manner inconsistent with *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940), and *Regents of University System of Georgia v. Carroll*, 338 U.S. 586, 602 (1950). Verizon Br. 49. *Carroll* simply held that the Commission's Title III authority was limited to regulating the licensee's use of spectrum and did not empower the agency to nullify third parties' state-law contract remedies with regulated entities. *See Southwestern Cable*, 392 U.S. at 173 n.37 (distinguishing *Carroll*). And *Sanders Bros.* merely states the unexceptional proposition that the Commission does not regulate aspects of a licensee's business that fall outside the agency's Title III powers. 309 U.S. at 475-76. Here, the FCC has regulated the licensed radio operations of wireless data providers without abrogating any state-law remedies.

Verizon also makes no effort to square its argument with the undisputed fact that the more rigorous common-carrier roaming requirements applicable to CMRS (*i.e.*, interconnected services) have, from the beginning,

been justified in part as an exercise of the FCC's Title III powers.[22] Because Title III provides a statutory basis for those roaming rules, as Verizon does not dispute, it also supports the data roaming requirement created by the *Order*. Indeed, Verizon has never challenged the FCC's reliance on its Title III authority to adopt roaming requirements for interconnected services.

This analysis does not change simply because data roaming has not been established as a common-carrier service subject to the FCC's Title II (as well as Title III) authority. Nothing on the face of the relevant Title III provisions suggests such a distinction, and the Commission correctly concluded that the application of Title III "is not affected by whether the service using the spectrum is a telecommunications service or information service under the Act." *Order* ¶ 62 n.166 (J.A.) (citing, *e.g.*, *2007 Wireless Broadband Order*, 22 FCC Rcd at 5915 (¶ 36)). Indeed, the Commission has often used its Title III powers to require licensees to offer non-common carrier services to prospective customers. *See, e.g.*, *Interconnection and*

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[22] *See Cellular Report & Order*, 86 FCC 2d at 503-04, 513 (¶¶ 80, 113) (relying on Title III in adopting initial manual roaming rule for cellular systems); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 11 FCC Rcd 9462, 9469, 9471 (¶¶ 10, 13) (1996) (extending manual roaming requirements to broadband Personal Communications Services and certain Specialized Mobile Radio carriers pursuant to Title III authority); *2007 Order*, 22 FCC Rcd at 15849 (¶ 92) (relying in part on Title III authority to adopt automatic roaming rules for CMRS carriers).

Resale Obligations Pertaining to Commercial Mobile Radio Service, 11 FCC Rcd 18455, 18471-72 (¶ 31) (1996) (requiring CMRS carriers to make bundled packages that include non-Title II components available for resale pursuant to Title III), *petition for review denied*, *Cellnet Commc'ns v. FCC*, 149 F.3d 429 (6th Cir. 1998); *id.*, Order on Reconsideration, 14 FCC Rcd 16340, 16352-53 (¶ 27) (1999) (reaffirming that Title III provides a basis for the bundled offering resale requirement).[23]

B. Section 706 Of The Telecommunications Act Of 1996 Independently Authorizes The Data Roaming Rule.

Even if the *Order* did impose a common-carriage obligation within the meaning of sections 153(51) and 332(c)(2) of the Communications Act

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[23] The Commission also correctly concluded that the data roaming requirement is supported by the agency's ancillary authority under Title I of the Communications Act. *See Am. Library Ass'n*, 406 F.3d at 691-92 (FCC may exercise ancillary jurisdiction where "(1) the Commission's general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."). The data roaming requirement is clearly within the agency's jurisdiction under Title I. *See, e.g.*, 47 U.S.C. § 152(a) (granting FCC jurisdiction over "all interstate and foreign communication by wire or radio."). It is also reasonably ancillary to the agency's effective performance of its Title III duties to manage, allocate, and assign spectrum, and to establish spectrum usage conditions. *Order* ¶ 63 n.176 (J.A.). Among other things, the Commission found that, absent data roaming rules, there was a significant risk that "even voice roaming will ultimately be rolled back as voice becomes a data application." *Order* ¶ 28 (J.A.). *Cf. Sw. Cable Co.*, 392 U.S. at 173-74 (upholding ancillary authority to regulate cable where necessary "to perform with appropriate effectiveness" its Title III authority over broadcasting).

(which, as shown above, it does not), the FCC properly asserted its independent authority to adopt the rule pursuant to section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302. That is so because sections 153(51) and 332(c)(2) only prohibit common-carriage treatment "under this [Act]" – *i.e.*, the Communications Act of 1934, as amended. 47 U.S.C. §§ 153(51) & 332(c)(2). Section 706 of the 1996 Act is not part of the Communications Act of 1934, and thus is not subject to those limitations on common-carrier treatment.[24]

Section 706(a) directs that the FCC

> shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure development.

[24] Congress enacted section 706 as an uncodified part of the 1996 Act. Congress recently codified section 706 in Chapter 12 of Title 47, at 47 U.S.C. § 1302. By contrast, the seven titles that comprise the Communications Act appear in Chapter 5 of Title 47. *See Preserving the Open Internet*, 25 FCC Rcd 17905, 17950 (¶ 79 n.248) (2010) ("*Open Internet Order*"), *pet. for review pending*, *Verizon v. FCC*, D.C. Cir. Nos. 11-1155 & 11-1156 (filed Sept. 30, 2011). Notably, not all Communications Act provisions barring common carriage treatment are limited to treatment under "this Act." The prohibition in section 153(11) – that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier" – contains no such limitation. 47 U.S.C. § 153(11). Nor does the statutory requirement that "[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service." 47 U.S.C. § 541(c).

47 U.S.C. § 1302(a).[25] Section 706(b) requires the FCC to inquire whether such reasonable and timely deployment of advanced telecommunication capability is taking place and, "[i]f the Commission's determination is negative," that provision mandates that the agency "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." 47 U.S.C. § 1302(b).

The FCC concluded in the *Order* that both of these provisions support the data roaming rule because the rule "encourag[es] new deployment of advanced services to all Americans by promoting competition and by removing barriers to infrastructure investment." *Order* ¶ 64 (J.A.). Noting estimates that "more than 10 million Americans live in rural census blocks with two or fewer mobile service providers," the FCC determined that its rule

[25] "[A]dvanced telecommunications capability" includes broadband Internet access. 47 U.S.C. § 1302(d)(1) (defining "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology"); *see also Open Internet Order*, 25 FCC Rcd at 17968 (¶ 117).

would encourage network upgrades and ubiquitous advanced mobile service deployment, "including in rural areas." *Order* ¶ 64 (J.A.).[26]

Verizon responds by citing language in a 13-year-old Commission order that could be construed as suggesting that the FCC – at that time – did not view section 706 as an independent grant of regulatory authority. Br. 51 (citing *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012, 24047 (¶ 77) (1998) ("*Advanced Services Order*")). But this Court has acknowledged that section 706 "at least arguably . . . delegate[s] regulatory authority to the Commission," noting that it "contain[s] a direct mandate." *Comcast Corp. v. FCC*, 600 F.3d 642, 658 (D.C. Cir. 2010). In the recent *Open Internet Order*, which the FCC cited in connection with its section 706 discussion in the *Order* on review (¶ 64 n.179 (J.A.)), the Commission rejected the position

[26] In July 2010, the FCC found that "broadband deployment to *all* Americans is not reasonable and timely" and observed, "[a]s a consequence of that conclusion," that section 706(b)'s directive to "take immediate action" had been triggered. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Sixth Broadband Deployment Report, 25 FCC Rcd 9556, 9558 (¶¶ 2-3) (2010). In May 2011, the Commission maintained its conclusion that "broadband is not being deployed in a reasonable and timely fashion to all Americans," and cited the adoption of the data roaming *Order* as one of the actions it had taken pursuant to section 706 in response to the previous year's negative finding. Seventh Broadband Progress Report and Order on Reconsideration, 26 FCC Rcd 8008, 8009, 8015 (¶¶ 1, 11) (2011).

that section 706 does not contain an independent grant of regulatory authority. *See Open Internet Order*, 25 FCC Rcd at 17968-72 (¶¶ 117-123). Verizon does not even acknowledge this governing articulation of the agency's section 706 powers, which expressly overrules the *Advanced Services Order* to the extent it is construed to deny that section 706 is an independent grant of authority to the FCC. *Id.* at 17969 (¶ 119 n.370).

C. Verizon's Fifth Amendment Argument Is Meritless, And Provides No Basis For Displacing *Chevron* Deference In This Case.

In an effort to bolster its statutory authority argument, Verizon enlists the canon of constitutional avoidance. Specifically, relying on *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, Verizon contends that the data roaming rule is beyond the FCC's statutory authority because it "raise[s] a substantial takings issue in an 'identifiable class of cases.'" Br. 52 (quoting *Bell Atlantic*, 24 F.3d at 1445). In such circumstances, Verizon claims, the FCC may impose a regulatory requirement only where "Congress has expressly and specifically directed the Commission" to do so. Br. 52. This argument is meritless.

As this Court has held, the plain statement analysis of *Bell Atlantic* applies only to *per se* takings, such as the permanent physical occupation of space in telephone companies' buildings under the rules at issue in *Bell Atlantic. Bldg. Owners and Managers Ass'n Int'l v. FCC*, 254 F.3d at 99. By

contrast, because "regulatory taking" claims are "context-specific" and require "'ad hoc, factual inquiries,'" they "cannot be said to create" the identifiable class of applications that *necessarily* constitutes a taking to which the *Bell Atlantic* rule applies. *Building Owners*, 254 F.3d at 99 (quoting *Penn Central Transp. v. New York City*, 438 U.S. 104, 124 (1978)). Accordingly, "the *Bell Atlantic* approach to statutory interpretation" – requiring express Congressional authorization – "does not apply" to agency rules alleged to raise regulatory takings concerns. *Building Owners*, 254 F.3d at 99. Rather, normal "*Chevron* analysis . . . does." *Id.*

Verizon attempts to equate the data roaming rule to the physical occupation of real estate in *Bell Atlantic* by claiming that the data roaming rule requires host providers to carry "data . . . represented in electrons that tangibly occupy limited physical space on the host carrier's network and physical infrastructure." Br. 53. But the courts have squarely rejected the view that electronic signal transport requirements – divorced from any obligation to allow third-party personnel or equipment on a host's property – are physical occupations that raise *per se* takings concerns. *See Cablevision Sys.*, 570 F.3d at 98 (affirming FCC finding that mandatory electronic signal carriage was not a permanent physical occupation of cable operator's network and that the takings claim "fits more comfortably within the Supreme Court's

'regulatory taking' analytical framework"); *Qwest Corp. v. United States*, 48 Fed. Cl. 672, 694 (2001) (rejecting telephone company's claim that "the telecommunications traffic (*i.e.*, electrical impulses) of a competing carrier on the host carrier's equipment pursuant to a mandatory lease can be considered a 'physical taking' of that equipment.").

The opinions Verizon cites (Br. 53) to support its contrary "electronic occupation" theory are neither binding nor pertinent. Judge Williams' dissenting opinion as a district judge in *Turner Broadcasting* merely argued that a takings claim is "not . . . frivolous." *Turner Broad, Sys., Inc. v. FCC*, 819 F. Supp. 32, 67 (D.D.C. 1993) (Williams, J., dissenting), *vacated on other grounds*, 512 U.S. 622 (1994). *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997), did not involve takings law at all. The Court, accordingly, should reject Verizon's contention that the data roaming rule imposes a *per se* taking subject to *Bell Atlantic*'s plain-statement requirement.

Verizon suggests that even if the data roaming rule does not constitute a *per se* taking, it nevertheless effects a regulatory taking under *Penn Central*, because it allegedly interferes with investment-backed expectations. Br. 55. Verizon provides no persuasive support for that claim, which second guesses the expert agency's predictive judgment that its rule will "appropriately

balance the incentives for new entrants and incumbent providers to invest in and deploy advanced networks across the country." *Order* ¶ 13 (J.A.). In any event, even if that regulatory takings claim were supported, it would provide no basis to displace the *Chevron* deference owed the FCC's reasonable construction of its statutory authority to adopt the *Order*. *Building Owners*, 254 F.3d at 99.

Finally, the *Bell Atlantic* rule is inapplicable because it was premised on the concern that construing ambiguous statutes to "create[] a broad class of takings claims, compensable in the Court of Claims, would . . . expose the Treasury to liability both massive and unforeseen." 24 F.3d at 1445. The data roaming rule permits hosts to charge other providers commercially reasonable rates that surely would satisfy the Constitution's "reasonable compensation" standard and avoid any claim on the public fisc. *See Order*

¶ 69 (J.A.) ("It does not appear to be possible that compensation could be 'unjust' if it is commercially reasonable.").[27]

III. THE DATA ROAMING RULE IS THE PRODUCT OF REASONED AGENCY DECISIONMAKING

Verizon concludes with a hodgepodge of makeweight contentions that the FCC's data roaming *Order* is arbitrary and capricious. Br. 56-59. Recycling a claim it made in challenging the FCC's statutory authority (*see* Br. 35), Verizon argues that the *Order* departs without explanation from prior statements that roaming is a common-carrier obligation. Br. 56-57. As previously explained, the FCC has never stated that all roaming inherently is common carriage. Rather, the FCC stated in the *2007 Order* and the *2010 Reconsideration* that interconnected CMRS roaming under Rule 20.12(d) – which expressly invoked the common carriage standards of sections 201 and 202 – constitutes common carriage. By contrast, the *Order* (which governs non-interconnected commercial data services) only requires host providers to

[27] To the extent that Verizon asserts a constitutional claim that the data roaming rule effects a taking without "just compensation" (U.S. Const. amend. V), rather than simply arguing that it is beyond the FCC's authority under the Communications Act (*see* Br. 55-56 & n.13), that claim is premature. As this Court observed in *Building Owners*, "'in general, [e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to that taking.'" 254 F.3d at 99 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985)).

negotiate on a commercially reasonable basis and expressly does not require common carriage. Thus, the *Order* did not depart from agency precedent on this question.

Nor is there merit to Verizon's assertion that there was no record evidence of a data roaming problem requiring regulatory intervention. Br. 57. The FCC expressly rejected Verizon's evidentiary claims, *see Order* ¶ 12 n.40 (J.A.), finding abundant record evidence that requesting providers were encountering "significant difficulties obtaining data roaming arrangements," particularly with respect to competitively crucial 3G services. *Order* ¶ 24 (J.A.). Indeed, the FCC noted that AT&T and Verizon had widely deployed advanced 3G networks for years before they began to offer limited roaming arrangements over those networks – and their eventual change of position occurred only when the Commission neared adoption of a mandatory data roaming obligation. *Id.* ¶¶ 25-26 (J.A.).

That record fully justified the FCC's concern that the limited progress achieved with respect to fully voluntary 3G roaming could well reflect a tactical effort to stave off regulation, and was not necessarily indicative of future conduct in the absence of a data roaming requirement. *Order* ¶ 27 (J.A.); *see also* pp. 13-14, above. Indeed, the prior pattern of steadfast opposition by AT&T and Verizon to offering other providers data roaming on

their 3G networks gave the FCC ample reason for concern that, absent regulation, those providers would "not be willing to offer roaming arrangements . . . any time in the near future" over the fourth generation networks they are now deploying. *Id.*

In sum, the FCC had a concrete basis in the record to conclude that the data roaming rule was needed to promote the development of competitive facilities-based broadband data service offerings for the benefit of the public. That predictive judgment is entitled to deference. *WNCN Listeners Guild*, 450 U.S. at 594-95.

Finally, Verizon invents a non-existent contradiction in the FCC's cost-benefit analysis (Br. 58-59) when it points to the agency's prediction that "providers are unlikely to rely on roaming arrangements in place of network deployment as the primary source of their service provision" due to the relatively high cost of purchasing roaming compared with providing service over their own facilities. *Order* ¶ 21 (J.A.). Contrary to Verizon's misstatement of the FCC's analysis, the Commission did not assert that the data roaming rule would impose no costs on host providers because the rule would never be invoked. Rather, the FCC credited evidence that roaming would be used initially to develop a large enough customer base to justify subsequent network build-out in new geographic areas, *Order* ¶ 19 (J.A.),

and the agency acknowledged that there may be some sparsely populated areas where the presence of more than one facilities-based network "is simply uneconomic," *id.* ¶ 15 n.51 (J.A.). The FCC appropriately balanced the limited costs of data roaming on host providers against the benefits of the rule, and concluded that the rule was justified because the benefits outweighed the costs. *Order* ¶¶ 28-36 (J.A.). Verizon neither disputes the deference that the expert agency is owed in undertaking such an analysis (*see* Verizon Br. 23) nor shows that the agency abused its discretion in undertaking that analysis.

CONCLUSION

For the foregoing reasons, the Court should dismiss Verizon's appeal in Case No. 11-1135 for want of jurisdiction, and deny its petition for review in Case No. 11-1136.

Respectfully submitted,

SHARIS A. POZEN
ACTING ASSISTANT ATTORNEY GENERAL

CATHERINE G. O'SULLIVAN
FINNUALA K. TESSIER
ATTORNEYS

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

AUSTIN C. SCHLICK
GENERAL COUNSEL

PETER KARANJIA
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY ASSOCIATE GENERAL COUNSEL

/s/ Laurence N. Bourne

LAURENCE N. BOURNE
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

January 9, 2012

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

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS, APPELLANT/PETITIONER, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, APPELLEE/RESPONDENTS.	NO. 11-1135 & 11-1136

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13,879 words.

/s/ Laurence N. Bourne
Laurence N. Bourne
Counsel
Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740 (Telephone)
(202) 418-2819 (Fax)

January 9, 2012

STATUTORY APPENDIX

47 C.F.R. § 20.12

47 U.S.C. § 153(11)
47 U.S.C. § 153(51)
47 U.S.C. § 201
47 U.S.C. § 202
47 U.S.C. § 208
47 U.S.C. § 301
47 U.S.C. § 303(b), (g), (r)
47 U.S.C. § 309
47 U.S.C. § 316
47 U.S.C. § 332
47 U.S.C. § 1302

47 C.F.R. § 20.12

Code of Federal Regulations
Title 47. Telecommunication
Chapter I. Federal Communications Commission
Subchapter B. Common Carrier Services
Part 20. Commercial Mobile Services

§ 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.

(3) Scope of Offering Roaming Arrangements for Commercial Mobile Data Services. Paragraph (e) of this section is applicable to all facilities-based providers of commercial mobile data services.

(b) Resale. The resale rule is applicable as follows:

(1) Each carrier subject to paragraph (b) of this section shall not restrict the resale of its services, unless the carrier demonstrates that the restriction is reasonable.

(2) The resale requirement shall not apply to customer premises equipment, whether or not it is bundled with services subject to the resale requirement in this paragraph.

(3) This paragraph shall cease to be effective five years after the last group of initial licenses for broadband PCS spectrum in the 1850–1910 and the 1930–1990 MHz bands is awarded; i.e., at the close of November 24, 2002.

(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, facilities-based CMRS carrier on reasonable and not unreasonably discriminatory terms and conditions, pursuant to Sections 201 and 202 of the Communications Act, 47 U.S.C. 201 and 202. The Commission shall presume that a request by a technologically compatible CMRS carrier for automatic roaming is

reasonable pursuant to Sections 201 and 202 of the Communications Act, 47 U.S.C. 201 and 202. This presumption may be rebutted on a case by case basis. The Commission will resolve automatic roaming disputes on a case-by-case basis, taking into consideration the totality of the circumstances presented in each case.

(e) Offering Roaming Arrangements for Commercial Mobile Data Services.

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

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

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

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

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

(2) A party alleging a violation of this section may file a formal or informal complaint pursuant to the procedures in §§ 1.716 through 1.718, 1.720, 1.721, and 1.723 through 1.735 of this chapter, which sections are incorporated herein. For purposes of § 20.12(e), references to a "carrier"

or "common carrier" in the formal and informal complaint procedures incorporated herein will mean a provider of commercial mobile data services. The Commission will resolve such disputes on a case-by-case basis, taking into consideration the totality of the circumstances presented in each case. The remedy of damages shall not be available in connection with any complaint alleging a violation of this section. Whether the appropriate procedural vehicle for a dispute is a complaint under this paragraph or a petition for declaratory ruling under § 1.2 of this chapter may vary depending on the circumstances of each case.

47 U.S.C. § 153

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5 -- WIRE OR RADIO COMMUNICATION
SUBCHAPTER I -- GENERAL PROVISIONS

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires--

* * * * *

(11) Common carrier

The term "common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

* * * * *

(51) Telecommunications carrier

The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

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47 U.S.C. § 201

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 201. Service and charges

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

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the

Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. § 202

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 202. Discriminations and preferences

(a) Charges, services, etc.

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

(b) Charges or services included

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

(c) Penalty

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

47 U.S.C. § 208

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

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

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

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

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

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

47 U.S.C. § 301

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER III. SPECIAL PROVISIONS RELATING TO RADIO
PART I. GENERAL PROVISIONS

§ 301. License for radio communication or transmission of energy

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

47 U.S.C. § 303

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER III. SPECIAL PROVISIONS RELATING TO RADIO
PART I. GENERAL PROVISIONS

§ 303. Powers and duties of Commission

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

* * * * *

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

* * * * *

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

* * * * *

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

* * * * *

47 U.S.C. § 309

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER III. SPECIAL PROVISIONS RELATING TO RADIO
PART I. GENERAL PROVISIONS

§ 309. Application for license

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) Time of granting application

Except as provided in subsection (c) of this section, no such application--

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services, or

(2) for an instrument of authorization in the case of a station in any of the following categories:

(A) industrial radio positioning stations for which frequencies are assigned on an exclusive basis,

(B) aeronautical en route stations,

(C) aeronautical advisory stations,

(D) airdrome control stations,

(E) aeronautical fixed stations, and

(F) such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe,

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

(c) Applications not affected by subsection (b)

Subsection (b) of this section shall not apply--

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for--

(A) a minor change in the facilities of an authorized station,

(B) consent to an involuntary assignment or transfer under section 310(b) of this title or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control,

(C) a license under section 319(c) of this title or, pending application for or grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license,

(D) extension of time to complete construction of authorized facilities,

(E) an authorization of facilities for remote pickups, studio links and similar facilities for use in the operation of a broadcast station,

(F) authorizations pursuant to section 325(c) of this title where the programs to be transmitted are special events not of a continuing nature,

(G) a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or not to exceed sixty days pending the filing of an application for such regular operation, or

(H) an authorization under any of the proviso clauses of section 308(a) of this title.

(d) Petition to deny application; time; contents; reply; findings

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section (or subsection (k) of this

section in the case of renewal of any broadcast station license). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section (or subsection (k) of this section in the case of renewal of any broadcast station license), it shall proceed as provided in subsection (e) of this section.

(e) Hearings; intervention; evidence; burden of proof

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for

intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

(f) Temporary authorization of temporary operations under subsection (b)

When an application subject to subsection (b) of this section has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of such temporary operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such temporary operations for a period not exceeding 180 days, and upon making like findings may extend such temporary authorization for additional periods not to exceed 180 days. When any such grant of a temporary authorization is made, the Commission shall give expeditious treatment to any timely filed petition to deny such application and to any petition for rehearing of such grant filed under section 405 of this title.

(g) Classification of applications

The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section.

(h) Form and conditions of station licenses

Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; (2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this chapter; (3) every license issued under this chapter shall be subject in terms to the right of use or control conferred by section 606 of this title.

(i) Random selection

(1) General authority

Except as provided in paragraph (5), if there is more than one application for any initial license or construction permit, then the Commission shall have the authority to grant such license or permit to a qualified applicant through the use of a system of random selection.

(2) No license or construction permit shall be granted to an applicant selected pursuant to paragraph (1) unless the Commission determines the qualifications of such applicant pursuant to subsection (a) of this section and section 308(b) of this title. When substantial and material questions of fact exist concerning such qualifications, the Commission shall conduct a hearing in order to make such determinations. For the purpose of making such determinations, the Commission may, by rule, and notwithstanding any other provision of law--

(A) adopt procedures for the submission of all or part of the evidence in written form;

(B) delegate the function of presiding at the taking of written evidence to Commission employees other than administrative law judges; and

(C) omit the determination required by subsection (a) of this section with respect to any application other than the one selected pursuant to paragraph (1).

(3)(A) The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.

(B) The Commission shall have authority to require each qualified applicant seeking a significant preference under subparagraph (A) to submit to the Commission such information as may be necessary to enable the Commission to make a determination regarding whether such applicant shall be granted such preference. Such information shall be submitted in such form, at such times, and in accordance with such procedures, as the Commission may require.

(C) For purposes of this paragraph:

(i) The term "media of mass communications" includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee.

(ii) The term "minority group" includes Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders.

(4)(A) The Commission shall, after notice and opportunity for hearing, prescribe rules establishing a system of random selection for use by the Commission under this subsection in any instance in which the Commission, in its discretion, determines that such use is appropriate for the granting of any license or permit in accordance with paragraph (1).

(B) The Commission shall have authority to amend such rules from time to time to the extent necessary to carry out the provisions of this subsection. Any such amendment shall be made after notice and opportunity for hearing.

(C) Not later than 180 days after August 10, 1993, the Commission shall prescribe such transfer disclosures and antitrafficking restrictions and payment schedules as are necessary to prevent the unjust enrichment of recipients of licenses or permits as a result of the methods employed to issue licenses under this subsection.

(5) Termination of authority

(A) Except as provided in subparagraph (B), the Commission shall not issue any license or permit using a system of random selection under this subsection after July 1, 1997.

(B) Subparagraph (A) of this paragraph shall not apply with respect to licenses or permits for stations described in section 397(6) of this title.

(j) Use of competitive bidding

(1) General authority

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license

or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) Exemptions

The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission--

(A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that--

(i) are used to protect the safety of life, health, or property; and

(ii) are not made commercially available to the public;

(B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

(C) for stations described in section 397(6) of this title.

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combinations or groups

of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum;

(E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed; and

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.

(F) for any auction of eligible frequencies described in section 923(g)(2) of this title, the recovery of 110 percent of estimated relocation costs as provided to the Commission pursuant to section 923(g)(4) of this title.

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall--

(A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

(B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;

(C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures;

(E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits; and

(F) prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, to obtain any license or permit being assigned pursuant to the competitive bidding, unless the Commission determines that such a reserve price or minimum bid is not in the public interest.

(5) Bidder and licensee qualification

No person shall be permitted to participate in a system of competitive bidding pursuant to this subsection unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing. No license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to subsection (a) of this section and sections 308(b) and 310 of this title. Consistent with the objectives described in paragraph (3), the Commission shall, by regulation, prescribe expedited procedures consistent with the procedures authorized by subsection (i)(2) of this section for the resolution of any substantial and material issues of fact concerning qualifications.

(6) Rules of construction

Nothing in this subsection, or in the use of competitive bidding, shall--

(A) alter spectrum allocation criteria and procedures established by the other provisions of this chapter;

(B) limit or otherwise affect the requirements of subsection (h) of this section, section 301, 304, 307, 310, or 606 of this title, or any other provision of this chapter (other than subsections (d)(2) and (e) of this section);

(C) diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses;

(D) be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection;

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;

(F) be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits;

(G) be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology; or

(H) be construed to relieve any applicant for a license or permit of the obligation to pay charges imposed pursuant to section 158 of this title.

(7) Consideration of revenues in public interest determinations

(A) Consideration prohibited

In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited

In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(C) Consideration of demand for spectrum not affected

Nothing in this paragraph shall be construed to prevent the Commission from continuing to consider consumer demand for spectrum-based services.

(8) Treatment of revenues

(A) General rule

Except as provided in subparagraphs (B), (D), and (E), all proceeds from the use of a competitive bidding system under this subsection shall be deposited in the Treasury in accordance with chapter 33 of Title 31.

(B) Retention of revenues

Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this subsection. Such offsetting collections shall be available for obligation subject to the terms and conditions of the receiving appropriations account, and shall be deposited in such accounts on a quarterly basis. Such offsetting collections are authorized to remain available until expended. No sums may be retained under this subparagraph during any fiscal year beginning after September 30, 1998, if the annual report of the Commission under section 154(k) of this title for the second preceding fiscal year fails to include in the itemized statement required by paragraph (3) of such section a statement of each expenditure made for purposes of conducting competitive bidding under this subsection during such second preceding fiscal year.

(C) Deposit and use of auction escrow accounts

Any deposits the Commission may require for the qualification of any person to bid in a system of competitive bidding pursuant to this subsection shall be deposited in an interest bearing account at a financial institution designated for purposes of this subsection by the Commission (after consultation with the Secretary of the Treasury). Within 45 days following the conclusion of the competitive bidding--

(i) the deposits of successful bidders shall be paid to the Treasury, except as otherwise provided in subparagraph (E)(ii);

(ii) the deposits of unsuccessful bidders shall be returned to such bidders; and

(iii) the interest accrued to the account shall be transferred to the Telecommunications Development Fund established pursuant to section 614 of this title.

(D) Disposition of cash proceeds

Cash proceeds attributable to the auction of any eligible frequencies described in section 923(g)(2) of this title shall be deposited in the Spectrum Relocation Fund established under section 928 of this title, and shall be available in accordance with that section.

(E) Transfer of receipts

(i) Establishment of fund

There is established in the Treasury of the United States a fund to be known as the Digital Television Transition and Public Safety Fund.

(ii) Proceeds for funds

Notwithstanding subparagraph (A), the proceeds (including deposits and upfront payments from successful bidders) from the use of a competitive bidding system under this subsection with respect to recovered analog spectrum shall be deposited in the Digital Television Transition and Public Safety Fund.

(iii) Transfer of amount to Treasury

On September 30, 2009, the Secretary shall transfer $7,363,000,000 from the Digital Television Transition and Public Safety Fund to the general fund of the Treasury.

(iv) Recovered analog spectrum

For purposes of clause (i), the term "recovered analog spectrum" has the meaning provided in paragraph (15)(C)(vi).

(9) Use of former government spectrum

The Commission shall, not later than 5 years after August 10, 1993, issue licenses and permits pursuant to this subsection for the use of bands of frequencies that--

(A) in the aggregate span not less than 10 megahertz; and

(B) have been reassigned from Government use pursuant to part B of the National Telecommunications and Information Administration Organization Act [47 U.S.C.A. § 921 et. seq.].

(10) Authority contingent on availability of additional spectrum

(A) Initial conditions

The Commission's authority to issue licenses or permits under this subsection shall not take effect unless--

(i) the Secretary of Commerce has submitted to the Commission the report required by section 113(d)(1) of the National Telecommunications and Information Administration Organization Act [47 U.S.C.A. § 923(d)(1)];

(ii) such report recommends for immediate reallocation bands of frequencies that, in the aggregate, span not less than 50 megahertz;

(iii) such bands of frequencies meet the criteria required by section 113(a) of such Act [47 U.S.C.A. § 923(a)]; and

(iv) the Commission has completed the rulemaking required by section 332(c)(1)(D) of this title.

(B) Subsequent conditions

The Commission's authority to issue licenses or permits under this subsection on and after 2 years after August 10, 1993, shall cease to be effective if--

(i) the Secretary of Commerce has failed to submit the report required by section 113(a) of the National Telecommunications and Information Administration Organization Act [47 U.S.C.A. § 923(a)];

(ii) the President has failed to withdraw and limit assignments of frequencies as required by paragraphs (1) and (2) of section 114(a) of such Act [47 U.S.C.A. § 924(a)];

(iii) the Commission has failed to issue the regulations required by section 115(a) of such Act [47 U.S.C.A. § 925(a)];

(iv) the Commission has failed to complete and submit to Congress, not later than 18 months after August 10, 1993, a study of current and future spectrum needs of State and local government public safety agencies through the year 2010, and a specific plan to ensure that adequate frequencies are made available to public safety licensees; or

(v) the Commission has failed under section 332(c)(3) of this title to grant or deny within the time required by such section any petition that a State has filed within 90 days after August 10, 1993;

until such failure has been corrected.

(11) Termination

The authority of the Commission to grant a license or permit under this subsection shall expire September 30, 2012.

(12) Evaluation

Not later than September 30, 1997, the Commission shall conduct a public inquiry and submit to the Congress a report--

(A) containing a statement of the revenues obtained, and a projection of the future revenues, from the use of competitive bidding systems under this subsection;

(B) describing the methodologies established by the Commission pursuant to paragraphs (3) and (4);

(C) comparing the relative advantages and disadvantages of such methodologies in terms of attaining the objectives described in such paragraphs;

(D) evaluating whether and to what extent--

(i) competitive bidding significantly improved the efficiency and effectiveness of the process for granting radio spectrum licenses;

(ii) competitive bidding facilitated the introduction of new spectrum-based technologies and the entry of new companies into the telecommunications market;

(iii) competitive bidding methodologies have secured prompt delivery of service to rural areas and have adequately addressed the needs of rural spectrum users; and

(iv) small businesses, rural telephone companies, and businesses owned by members of minority groups and women were able to participate successfully in the competitive bidding process; and

(E) recommending any statutory changes that are needed to improve the competitive bidding process.

(13) Recovery of value of public spectrum in connection with pioneer preferences

(A) In general

Notwithstanding paragraph (6)(G), the Commission shall not award licenses pursuant to a preferential treatment accorded by the Commission to persons who make significant contributions to the development of a new telecommunications service or technology, except in accordance with the requirements of this paragraph.

(B) Recovery of value

The Commission shall recover for the public a portion of the value of the public spectrum resource made available to such person by requiring such person, as a condition for receipt of the license, to agree to pay a sum determined by--

(i) identifying the winning bids for the licenses that the Commission determines are most reasonably comparable in terms of bandwidth, scope of service area, usage restrictions, and other technical characteristics to the license awarded to such person, and excluding licenses that the Commission determines are subject to bidding anomalies due to the award of preferential treatment;

(ii) dividing each such winning bid by the population of its service area (hereinafter referred to as the per capita bid amount);

(iii) computing the average of the per capita bid amounts for the licenses identified under clause (i);

(iv) reducing such average amount by 15 percent; and

(v) multiplying the amount determined under clause (iv) by the population of the service area of the license obtained by such person.

(C) Installments permitted

The Commission shall require such person to pay the sum required by subparagraph (B) in a lump sum or in guaranteed installment payments, with or without royalty payments, over a period of not more than 5 years.

(D) Rulemaking on pioneer preferences

Except with respect to pending applications described in clause (iv) of this subparagraph, the Commission shall prescribe regulations specifying the procedures and criteria by which the Commission will evaluate applications for preferential treatment in its licensing processes (by precluding the filing of mutually exclusive applications) for persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service. Such regulations shall--

(i) specify the procedures and criteria by which the significance of such contributions will be determined, after an opportunity for review and verification by experts in the radio sciences drawn from among persons who are not employees of the Commission or by any applicant for such preferential treatment;

(ii) include such other procedures as may be necessary to prevent unjust enrichment by ensuring that the value of any such contribution justifies any reduction in the amounts paid for comparable licenses under this subsection;

(iii) be prescribed not later than 6 months after December 8, 1994;

(iv) not apply to applications that have been accepted for filing on or before September 1, 1994; and

(v) cease to be effective on the date of the expiration of the Commission's authority under subparagraph (F).

(E) Implementation with respect to pending applications.--In applying this paragraph to any broadband licenses in the personal communications service awarded pursuant to the preferential treatment accorded by the Federal Communications Commission in the Third Report and Order in General Docket 90-314 (FCC 93-550, released February 3, 1994)--

(i) the Commission shall not reconsider the award of preferences in such Third Report and Order, and the Commission shall not delay the grant of licenses based on such awards more than 15 days following December 8, 1994, and the award of such preferences and licenses shall not be subject to administrative or judicial review;

(ii) the Commission shall not alter the bandwidth or service areas designated for such licenses in such Third Report and Order;

(iii) except as provided in clause (v), the Commission shall use, as the most reasonably comparable licenses for purposes of subparagraph (B)(i), the broadband licenses in the personal communications service for blocks A and B for the 20 largest markets (ranked by population) in which no applicant has obtained preferential treatment;

(iv) for purposes of subparagraph (C), the Commission shall permit guaranteed installment payments over a period of 5 years, subject to--

(I) the payment only of interest on unpaid balances during the first 2 years, commencing not later than 30 days after the award of the license (including any preferential treatment used in making such award) is final and no longer subject to administrative or judicial review, except that no such payment shall be required prior to the date of completion of the auction of the comparable licenses described in clause (iii); and

(II) payment of the unpaid balance and interest thereon after the end of such 2 years in accordance with the regulations prescribed by the Commission; and

(v) the Commission shall recover with respect to broadband licenses in the personal communications service an amount under this paragraph that is equal to not less than $400,000,000, and if such amount is less than $400,000,000, the Commission shall recover an amount equal to $400,000,000 by allocating such amount among the holders of such licenses based on the population of the license areas held by each licensee.

The Commission shall not include in any amounts required to be collected under clause (v) the interest on unpaid balances required to be collected under clause (iv).

(F) Expiration

The authority of the Commission to provide preferential treatment in licensing procedures (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service shall expire on August 5, 1997.

(G) Effective date

This paragraph shall be effective on December 8, 1994, and apply to any licenses issued on or after August 1, 1994, by the Federal Communications Commission pursuant to any licensing procedure that provides preferential treatment (by precluding the filing of mutually exclusive applications) to persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service.

(14) Auction of recaptured broadcast television spectrum

(A) Limitations on terms of terrestrial full-power television broadcast licenses

A full-power television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond June 12, 2009.

(B) Spectrum reversion and resale

(i) The Commission shall--

(I) ensure that, as licenses for analog television service expire pursuant to subparagraph (A), each licensee shall cease using electromagnetic spectrum assigned to such service according to the Commission's direction; and

(II) reclaim and organize the electromagnetic spectrum in a manner consistent with the objectives described in paragraph (3) of this subsection.

(ii) Licensees for new services occupying spectrum reclaimed pursuant to clause (i) shall be assigned in accordance with this subsection.

(C) Certain limitations on qualified bidders prohibited

In prescribing any regulations relating to the qualification of bidders for spectrum reclaimed pursuant to subparagraph (B)(i), the Commission, for any license that may be used for any digital television service where the grade A contour of the station is projected to encompass the entirety of a city with a population in excess of 400,000 (as determined using the 1990 decennial census), shall not--

(i) preclude any party from being a qualified bidder for such spectrum on the basis of--

(I) the Commission's duopoly rule (47 C.F.R. 73.3555(b)); or

(II) the Commission's newspaper cross-ownership rule (47 C.F.R. 73.3555(d)); or

(ii) apply either such rule to preclude such a party that is a winning bidder in a competitive bidding for such spectrum from using such spectrum for digital television service.

(D) Redesignated (C)

(15) Commission to determine timing of auctions

(A) Commission authority

Subject to the provisions of this subsection (including paragraph (11)), but notwithstanding any other provision of law, the Commission shall determine the timing of and deadlines for the conduct of competitive bidding under this subsection, including the timing of and deadlines for qualifying for bidding;

conducting auctions; collecting, depositing, and reporting revenues; and completing licensing processes and assigning licenses.

(B) Termination of portions of auctions 31 and 44

Except as provided in subparagraph (C), the Commission shall not commence or conduct auctions 31 and 44 on June 19, 2002, as specified in the public notices of March 19, 2002, and March 20, 2002 (DA 02-659 and DA 02-563).

(C) Exception

(i) Blocks excepted

Subparagraph (B) shall not apply to the auction of--

(I) the C-block of licenses on the bands of frequencies located at 710-716 megahertz, and 740-746 megahertz; or

(II) the D-block of licenses on the bands of frequencies located at 716-722 megahertz.

(ii) Eligible bidders

The entities that shall be eligible to bid in the auction of the C-block and D-block licenses described in clause (i) shall be those entities that were qualified entities, and that submitted applications to participate in auction 44, by May 8, 2002, as part of the original auction 44 short form filing deadline.

(iii) Auction deadlines for excepted blocks

Notwithstanding subparagraph (B), the auction of the C-block and D-block licenses described in clause (i) shall be commenced no earlier than August 19, 2002, and no later than September 19, 2002, and the proceeds of such auction shall be deposited in accordance with paragraph (8) not later than December 31, 2002.

(iv) Report

Within one year after the date of enactment of this paragraph, the Commission shall submit a report to Congress--

(I) specifying when the Commission intends to reschedule auctions 31 and 44 (other than the blocks excepted by clause (i)); and

(II) describing the progress made by the Commission in the digital television transition and in the assignment and allocation of additional spectrum for advanced mobile communications services that warrants the scheduling of such auctions.

(v) Additional deadlines for recovered analog spectrum

Notwithstanding subparagraph (B), the Commission shall conduct the auction of the licenses for recovered analog spectrum by commencing the bidding not later than January 28, 2008, and shall deposit the proceeds of such auction in accordance with paragraph (8)(E)(ii) not later than June 30, 2008.

(vi) Recovered analog spectrum

For purposes of clause (v), the term "recovered analog spectrum" means the spectrum between channels 52 and 69, inclusive (between frequencies 698 and 806 megahertz, inclusive) reclaimed from analog television service broadcasting under paragraph (14), other than--

(I) the spectrum required by section 337 to be made available for public safety services; and

(II) the spectrum auctioned prior to February 8, 2006.

(D) Return of payments

Within one month after the date of enactment of this paragraph, the Commission shall return to the bidders for licenses in the A-block, B-block, and E-block of auction 44 the full amount of all upfront payments made by such bidders for such licenses.

(16) Special auction provisions for eligible frequencies

(A) Special regulations

The Commission shall revise the regulations prescribed under paragraph (4)(F) of this subsection to prescribe methods by which the total cash proceeds from any auction of eligible frequencies described in section 923(g)(2) of this title shall at least equal 110 percent of the total estimated relocation costs provided to the Commission pursuant to section 923(g)(4) of this title.

(B) Conclusion of auctions contingent on minimum proceeds

The Commission shall not conclude any auction of eligible frequencies described in section 923(g)(2) of this title if the total cash proceeds attributable to such spectrum are less than 110 percent of the total estimated relocation costs provided to the Commission pursuant to section 923(g)(4) of this title. If the Commission is unable to conclude an auction for the foregoing reason, the Commission shall cancel the auction, return within 45 days after the auction cancellation date any deposits from participating bidders held in escrow, and absolve such bidders from any obligation to the United States to bid in any subsequent reauction of such spectrum.

(C) Authority to issue prior to deauthorization

In any auction conducted under the regulations required by subparagraph (A), the Commission may grant a license assigned for the use of eligible frequencies prior to the termination of an eligible Federal entity's authorization. However, the Commission shall condition such license by requiring that the licensee cannot cause harmful interference to such Federal entity until such entity's authorization has been terminated by the National Telecommunications and Information Administration.

(k) Broadcast station renewal procedures

(1) Standards for renewal

If the licensee of a broadcast station submits an application to the Commission for renewal of such license, the Commission shall grant the application if it finds, with respect to that station, during the preceding term of its license--

(A) the station has served the public interest, convenience, and necessity;

(B) there have been no serious violations by the licensee of this chapter or the rules and regulations of the Commission; and

(C) there have been no other violations by the licensee of this chapter or the rules and regulations of the Commission which, taken together, would constitute a pattern of abuse.

(2) Consequence of failure to meet standard

If any licensee of a broadcast station fails to meet the requirements of this subsection, the Commission may deny the application for renewal in accordance with paragraph (3), or grant such application on terms and conditions as are

appropriate, including renewal for a term less than the maximum otherwise permitted.

(3) Standards for denial

If the Commission determines, after notice and opportunity for a hearing as provided in subsection (e) of this section, that a licensee has failed to meet the requirements specified in paragraph (1) and that no mitigating factors justify the imposition of lesser sanctions, the Commission shall--

(A) issue an order denying the renewal application filed by such licensee under section 308 of this title; and

(B) only thereafter accept and consider such applications for a construction permit as may be filed under section 308 of this title specifying the channel or broadcasting facilities of the former licensee.

(4) Competitor consideration prohibited

In making the determinations specified in paragraph (1) or (2), the Commission shall not consider whether the public interest, convenience, and necessity might be served by the grant of a license to a person other than the renewal applicant.

(l) Applicability of competitive bidding to pending comparative licensing cases

With respect to competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997, the Commission shall--

(1) have the authority to conduct a competitive bidding proceeding pursuant to subsection (j) of this section to assign such license or permit;

(2) treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding; and

(3) waive any provisions of its regulations necessary to permit such persons to enter an agreement to procure the removal of a conflict between their applications during the 180-day period beginning on August 5, 1997.

47 U.S.C. § 316

United States Code Annotated
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication
Subchapter III. Special Provisions Relating to Radio
Part I. General Provisions

§ 316. Modification by Commission of station licenses or construction permits; burden of proof

(a)(1) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this chapter or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification; except that, where safety of life or property is involved, the Commission may by order provide, for a shorter period of notice.

(2) Any other licensee or permittee who believes its license or permit would be modified by the proposed action may also protest the proposed action before its effective date.

(3) A protest filed pursuant to this subsection shall be subject to the requirements of section 309 of this title for petitions to deny.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission; except that, with respect to any issue that addresses the question of whether the proposed action would modify the license or permit of a person described in subsection (a)(2) of this section, such burdens shall be as determined by the Commission.

47 U.S.C. § 332

United States Code Annotated
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication
Subchapter III. Special Provisions Relating to Radio
Part I. General Provisions

§ 332. Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will--

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory

coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of Title 5 or section 1342 of Title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that--

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

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

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

(B) Upon 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. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that--

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or

unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C.A. § 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C.A. § 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph--

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

(d) Definitions

For purposes of this section--

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

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

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

47 U.S.C. § 1302

United States Code Annotated
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 12. Broadband

§ 1302. Advanced telecommunications incentives

(a) In general

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry

The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) Demographic information for unserved areas

As part of the inquiry required by subsection (b), the Commission shall compile a list of geographical areas that are not served by any provider of advanced telecommunications capability (as defined by subsection (d)(1) of this section) and to the extent that data from the Census Bureau is available, determine, for each such unserved area--

(1) the population;

(2) the population density; and

(3) the average per capita income.

(d) Definitions

For purposes of this subsection:

(1) Advanced telecommunications capability

The term "advanced telecommunications capability" is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) Elementary and secondary schools

The term "elementary and secondary schools" means elementary and secondary schools, as defined in section 7801 of Title 20.

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

Cellco Partnership d/b/a Verizon Wireless, Appellant, Petitioner

v.

Federal Communications Commission and United States of America
Appellee/Respondent

CERTIFICATE OF SERVICE

I, Laurence N. Bourne, hereby certify that on January 9, 2012, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the 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 in the case, denoted with asterisks below, are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

*Andrew G. McBride
Thomas R. McCarthy
Brett A. Shumate
Helgi C. Walker
Wiley Rein LLP
1776 K Street, NW.
Washington, D.C. 20006-2359
Counsel for: Cellco Partnership

John T. Scott
Verizon Wireless
1300 Eye Street, N.W.
Suite 400 West
Washington, D.C. 20005
Counsel for: Cellco Partnership

11-1135
11-1136

Henry Weissmann
Munger, Tolles & Olson
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071-1560
Counsel for: Cellco Partnership

Catherine G. O'Sullivan
Finnuala K. Tessier
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Counsel for: USA

Mark A. Stachiw
General Counsel, Secretary and Vice Chairman
MetroPCS Communications, Inc.
2250 Lakeside Boulevard
Richardson, TX 75082
Counsel for: MetroPCS Communications, Inc.

Douglas E. Hart
441 Vine Street
Suite 4192
Cincinnati, OH 45202
Counsel for: Cincinnati Bell Wireless, LLC

Jill Canfield
4121 Wilson Boulevard
Arlington, VA 22203
Counsel for: National Telecommunications Cooperative Association

Richard P. Bress
*James H. Barker
Alexander Maltas
Matthew A. Brill
Latham & Watkins LLP
555 11th Street, N.W.
Suite 1000
Washington, D.C. 20004
Counsel for: Leap, Cricket and RCA

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

Howard J. Symons
Mintz Levin Cohn Ferris, et al.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
Counsel for: T-Mobile USA, Inc.

11-1135
11-1136

Caressa D. Bennet
*Michael R. Bennet
Bennet & Bennet, PLLC
4350 East West Highway
Suite 201
Bethesda, MD 20814
Counsel for: Rural Telecommunications Group, Inc.

Daniel L. Brenner
Jessica L. Ellsworth
Hogan Lovells US LLP
Columbia Square
555 13th Street, N.W.
Washington, D.C. 20004-1109
Counsel for: Bright House Networks, LLC

Peter M. Connolly
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, D.C. 20006
Counsel for: United States Cellular Corporation

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

Carl W. Northrop
Michael L. Lazarus
Telecommunications Law Professionals, PLLC
875 15th Street, N.W.
Washington, D.C. 20005-2400
Counsel for: MetroPCS Communications, Inc.

Michael Glover
Verizon
1320 N. Courthouse Road, 9th Floor
Arlington, VA 22201
Counsel for: Verizon

/s/ Laurence N. Bourne