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VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: Written *Ex Parte* Presentation, WT Docket No. 05-265
Re-Examination of the Roaming Obligations of CMRS Providers

Dear Ms. Dortch:

Verizon Wireless hereby responds to the *ex parte* letter filed on behalf of Southern Communications Services, Inc. ("SouthernLINC") imploring the Commission to adopt an automatic roaming obligation with regard to data services.¹ As Verizon Wireless has previously demonstrated, the record in this proceeding does not support imposition of any automatic roaming obligation. Contrary to SouthernLINC's claims here, data roaming does not involve the provisioning of "wholesale" transport capacity from one operator to another. Rather, data roaming is an integrated information service provided to the end user through the cooperative efforts of host and home operators. Title II obligations do not apply to these arrangements, nor is there a basis for mandating data roaming pursuant to Title I or Title III.

The Nature of Data Roaming. The provision of data roaming involves complex arrangements between the host and home operator resulting in a single integrated offering. The two operators must both have certain technical capabilities in place for roaming to occur, and they must exchange setup and authorization data specifically related to data roaming for the end user to obtain data service using the host operator's network. Data roaming is not something that a home operator can assemble unilaterally for sale to its customers using "dumb pipe" telecommunications capacity bought from the host operator.

A CDMA host operator, for example, may use one of the two principal methods for providing a home operator's customer with access to data services: Simple IP ("SIP") or Mobile IP ("MIP"). SIP may be provided using either direct access or Layer 2 Tunneling Protocol ("L2TP"). These technical arrangements vary. When SIP direct access is used, the host operator

¹ See Letter from Christine M. Gill, Counsel for SouthernLINC Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265 (filed July 2, 2007) ("SouthernLINC Letter").

provides the roamer with an IP address and access to the host's own Internet connection for web browsing; services requiring access to specific data applications on the home operator's network need to be routed back to the home network content providers' application servers by the host operator. With MIP and SIP utilizing L2TP, the host operator engages in the set up and authorization process and provides the end user with access to the home operator's network. Not all of these methods are available everywhere, and not all handsets can use them all. Which method is used for a given data session depends on the capabilities of the host operator, the home operator, and the handset. All methods require interaction between the host operator and the home operator to determine the nature of the data services for which a roaming customer is eligible.

Together, the host and home operators allow the end user to access data services when traveling outside the home operator's service area. These data services – email, Internet browsing, photo transmission and storage, etc. – are indisputably classified as information services. As described below, given this integrated provisioning the Commission must look to the service that is made available to the user, rather than to the relationship of the operators, for classification purposes.

Data Roaming is Not A Title II Service. SouthernLINC asserts that the host operator in a data roaming arrangement is providing a Title II service even when the end user offering is an information service. Its legal analysis is wrong.

SouthernLINC asks the FCC to extend to data roaming an analytical framework employed in a recent Wireline Competition Bureau decision, *Time Warner*, involving wholesale transport.² That decision involved the purchase by Time Warner Cable ("TWC") of discrete telecommunications services from an ILEC, which TWC then used as a wholesale input to the information services it provided to its own end users. Under that scenario – where the ILEC provided TWC pure transport and had no involvement with the end user – the Commission could reasonably disregard the nature of the end-user service in determining the classification of the service provided by the ILEC to TWC.³ But, unlike the discrete transport link provided by one carrier to another in that case, roaming is an integrated service provided to the end user through the cooperative effort of two operators, with no discrete wholesale transport "pipeline" provided by one operator for the other's use at its sole discretion. Here, the host operator is not merely handing off a telecommunications link to the home operator; it is actively engaged with the home operator to provide the home operator's roaming customer with access to information services,

² *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers may Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (WCB rel. Mar. 1, 2007) ("*Time Warner*").

³ *Time Warner* also correctly held that the analysis of whether a service is a telecommunications or an information service is the same whether it is offered on a wholesale or retail basis. It does not stand for the proposition, as SouthernLINC argues, that the nature of a retail service is always irrelevant to a business-to-business relationship.

either directly (though its own Internet access) or indirectly.⁴ As a result, the Commission must consider the nature of the service provided to the end user for classification purposes.

That, in fact, was the approach the FCC employed in a 1996 decision in which it addressed the classification of roaming from the end-user perspective. In that decision, the FCC concluded that the host operator was providing a common carrier service subject to Title II because the *end user* was obtaining interconnected voice mobile telephone service.⁵ The Commission rejected a classification based on the relationship between the two operators. Consistent with that decision, when the end user obtains roaming service that constitutes an information service, the host operator is necessarily engaged in the delivery of an information service, not a telecommunications service. As a result, Title II is inapplicable.⁶

Titles I and III Do Not Provide Authority to Regulate Data Roaming. SouthernLINC argues that if Title II does not provide a statutory basis to impose a data roaming requirement, the FCC should simply cite Title I or Title III as the appropriate authority. As it must, the FCC has carefully limited its exercise of ancillary authority over information services to situations where it is exercising jurisdiction narrowly in the furtherance of important statutory objectives. Here, SouthernLINC asks the FCC to “exercis[e] its Title I authority to formally extend the obligations of Sections 201 and 202” and “the remedies set forth in Section 208” to data roaming.⁷ The law is clear, however, that ancillary authority cannot be used to impose common carrier regulation on the provision of information services. The Communications Act of 1934, as amended expressly provides, “A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services.”⁸ In the *Broadband Wireless Internet Access Order*, the Commission recounted that Congress “inten[ded] to maintain a regime in which information service providers are not subject to Title II regulation as common carriers.”⁹ The Supreme Court, moreover, has stated, “the Act regulates telecommunications carriers, but not information-service providers, as common carriers.”¹⁰ Information services are thus exempted from common carrier regulation. Further, no section of

⁴ Under the “telecommunications management exception” to the definition of information service, 47 U.S.C. § 153(20), information exchanges that are used to manage a telecommunications service are deemed to be part of the telecommunications service, but that exception is inapplicable when the service being managed is an information service. See *BOC Petitions for Forbearance from the Application of Section 272*, 13 FCC Rcd 2627, 2638-39 (1998). Thus, the nature of the service provided to the end user is the key.

⁵ See *Interconnection and Resale Second Report and Order*, 11 FCC Rcd 9462, 9469 & n.30 (1996).

⁶ Even if the Commission were to focus on the relationship between the operators for purposes of classifying data roaming, the nature of the arrangement precludes a finding of common carriage. As noted above, data roaming arrangements involve varying technologies (e.g. SIP, MIP) that necessitate individualized arrangements between the home and host operators. As such, these dealings do not meet the definition of common carriage.

⁷ SouthernLINC Letter at 16.

⁸ 47 U.S.C. § 153(44).

⁹ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, 5916 (2007).

¹⁰ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005). In another context, the Supreme Court has similarly held that imposing common carrier obligations on certain entities notwithstanding an express bar on such treatment is an impermissible exercise of Title I jurisdiction. *Midwest Video Corp. v. FCC (Midwest Video II)*, 440 U.S. 689 (1979).

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Title III gives the FCC general authority over the business relationships between radio licensees. Titles I and III, therefore, provide no alternative basis to take action in this area.

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For the reasons discussed above, we urge the Commission to reject the argument that data services should be subject to automatic roaming obligations.

Respectfully submitted,



Andre J. Lachance

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