

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)
)
)
 Reexamination of Roaming Obligations of) WT Docket No. 05-265
 Commercial Mobile Radio Service Providers)
)

COMMENTS OF SPECTRUMCO LLC

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SpectrumCo LLC (“SpectrumCo”)¹ hereby responds to the Commission’s Further Notice of Proposed Rulemaking (“*Further Notice*”) in the above-captioned proceeding.²

I. INTRODUCTION & SUMMARY

The Commission’s recent decision clarifying that automatic roaming is a common carrier service was a critical first step as the next generation of wireless services begins to take shape. However, the decision only applied the automatic roaming right to commercial mobile radio service (“CMRS”) services that provide real-time, two-way switched voice or data services that are interconnected with the public switched telephone network (“PSTN”), as well as push-to-talk and text messaging. This narrowing of the automatic roaming right is incongruent with the Commission’s history of using its roaming policy to encourage new entry and the development

¹ SpectrumCo is a Delaware limited liability company, managed by C Spectrum Investment, LLC, a subsidiary of Comcast Corporation. Class B equity owners of SpectrumCo are C Spectrum Investment, LLC; Time Warner Cable LLC, a subsidiary of Time Warner Inc.; Cox Wireless, Inc., a subsidiary of Cox Enterprises, Inc.; and BHN Spectrum Investments, LLC, a subsidiary of Bright House Networks, LLC. SpectrumCo holds AWS licenses acquired in Auction 66 that give the company a near-nationwide footprint.

² *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817 (2007) (“*2007 Roaming Order*” or “*Further Notice*,” as appropriate).

of new services. To ensure that its rules continue to “serve the public interest and safeguard wireless consumers’ reasonable expectations of receiving seamless nationwide commercial mobile telephony services through roaming,”³ the Commission should take the opportunity presented by this *Further Notice* to conclude that the automatic roaming right applies regardless of whether the service interconnects with the PSTN, and particularly for high-speed data roaming.

As the next generation of wireless services makes its way to the marketplace, the Commission must ensure that wireless providers do not leverage their incumbent market position. Legitimate expectations of “seamless nationwide” wireless service are increasing, as consumers come to rely more and more on mobile services to meet their personal, professional, and safety needs, wherever they may happen to be. Consequently, to compete effectively in the wireless space, new entrants must be able to provide nationwide service from the start, and roaming will be a critical component of that ability.

The Commission has the necessary authority to clarify that the automatic roaming right applies to all CMRS services, including high-speed data roaming. As an initial matter, the record evidence strongly suggests that high-speed data roaming is merely transmission, not an information service, and thus would fall under the authority of Section 332 and other relevant provisions of Titles II and III of the Communications Act of 1934, as amended (the “Act”). Regardless, the Commission’s authority to take these actions is part and parcel with its authority under Section 303(r) and other provisions of Title III, which give the Commission authority to regulate the use of radio spectrum in the public interest. The Commission’s authority pursuant to

³ *Id.* ¶ 3.

Title I ancillary jurisdiction also sustains these actions, no matter how the Commission ultimately classifies the services.

Moreover, an automatic roaming right will encourage, not discourage, facilities-based competition. Some parties have argued in this proceeding that an automatic roaming right will encourage some carriers to “piggyback” on the networks of other carriers, creating a disincentive for both sets of carriers to build out new networks. These concerns are misplaced. Especially in light of recent Commission decisions to impose strict build-out requirements on licensees and to provide wide pricing latitude to roamed-on (or “host”) network operators, carriers have ample legal and economic incentives to deploy their networks as quickly as feasible.

The Commission’s recent spectrum management decisions have placed substantial emphasis on encouraging new entry and the development of new wireless services. Spectrum management policy is only one tool at the Commission’s disposal. Roaming always has been an integral part of the Commission’s pro-competition wireless policy. Standing on the brink of a new generation of wireless services -- many of which potentially are unlike any hitherto deployed -- it is absolutely essential to the widespread development and deployment of these services that the Commission’s roaming policy *remain* pro-competition. That goal can only be achieved, however, by clarifying that the automatic roaming right applies to high-speed data roaming, regardless of whether the service is interconnected to the PSTN.

II. THE COMMISSION MUST CONTINUE TO RECOGNIZE THE IMPORTANCE OF ACCESS TO AUTOMATIC ROAMING SERVICES

The Commission’s decision to clarify that automatic roaming is a common carrier right is the latest in a long line of Commission decisions recognizing that roaming is a critical service for wireless carriers and consumers. Its roaming policy -- and its wireless policy, generally -- has always recognized the important role that new potential entry plays in the competitive

marketplace, while also acknowledging that new potential entrants are at a decided disadvantage vis-à-vis incumbent operators in their ability to secure the critical services necessary to compete.

Just weeks ago, the Commission acknowledged a clear reality of wireless service, which should also serve to inform its decision here: “Consumers [have a] reasonable expectation[] of receiving seamless nationwide commercial mobile telephony service through roaming.”⁴ These expectations, however, are not limited to mobile telephony service. Consumers expect nationwide seamless service, regardless of whether they are using their mobile devices to make a voice call, check their e-mail, watch a recent episode of their favorite show, or check the latest news. High-speed data roaming will be an integral part of meeting those expectations, and ensuring that these services continue to be offered in a competitive milieu.

A. Automatic Roaming For High-Speed Data Services Encourages New Entry and Furthers the Development of New Wireless Services.

Promoting new wireless entry continues to be an important public policy objective,⁵ and is reaffirmed by two recent spectrum management decisions: the Advanced Wireless Services (“AWS”) band plan⁶ and the recently released 700 MHz band plan.⁷ As SpectrumCo explained

⁴ *Further Notice* ¶ 3.

⁵ The value of significant potential entrants such as SpectrumCo to the consuming public is well recognized. Significant potential entrants can benefit consumers by causing incumbents to perform better even prior to their entry, in addition to their competitive efforts once they have entered. *See* U.S. Department of Justice, *Non-Horizontal Merger Guidelines* (1984), available at <http://www.usdoj.gov/atr/public/guidelines/2614.htm>. *See also* *U.S. v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973). As a result, unnecessary barriers to entry -- such as an improperly defined automatic roaming right -- will harm both present and future competition and consumers.

⁶ *See Service Rules for Advanced Wireless Services In the 1.7 GHz and 2.1 GHz Bands*, Order on Reconsideration, 20 FCC Rcd 14058 (2005) (“*AWS Order on Reconsideration*”).

⁷ *See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling*

in its Petition for Reconsideration, spurring new entry has been one of the primary considerations in both of these proceedings.⁸ Commissioner Copps called the 700 MHz spectrum “some of the most valuable spectrum on earth,” and cited as one of the Commission’s top priorities “increas[ing] the number and quality of wireless services available to American consumers.”⁹

But access to spectrum is not enough to promote new wireless competitors. The Commission has always coupled access to spectrum with access to the truly critical services that incumbents provide each other, most notably roaming. The Commission’s decision in 1996 to expand the roaming right to cover all CMRS carriers was made at a time when broadband Personal Communications Service (“PCS”) licenses were in the midst of being auctioned and licensees had not yet built out their networks.¹⁰ The Commission concluded “that the availability

Systems; Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones; Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services; Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, Declaratory Ruling on Reporting Requirement Under Commission’s Part 1 Anti-Collusion Rule, Second Report and Order, 22 FCC Rcd 15289 (2007) (“700 MHz Second Order”).

⁸ See Petition for Reconsideration of SpectrumCo LLC, WT Dkt. No. 05-265, at 4-7 (filed Oct. 1, 2007) (“*SpectrumCo Petition*”). In the AWS proceeding, the Commission adopted a revised band plan that “increases the variety of licenses to meet the needs of potential new entrants.” *AWS Order on Reconsideration* ¶ 34. And in the very recent 700 MHz proceeding, the Commission adopted a band plan that included a large spectrum block specifically designed to encourage entry by a new competitor. See *700 MHz Second Order* ¶ 75 (noting that “larger spectrum blocks offer important benefits, including *providing sufficient spectrum to support the deployment of new and emerging competitors*”) (emphasis added).

⁹ *700 MHz Second Order*, Statement of Commissioner Copps, at 925.

¹⁰ For example, the auction of the PCS A and B block licenses was completed on March 13, 1995, about fifteen months before the Commission expanded roaming rights by adopting the 1996 Order. See *Commercial Mobile Radio Service Information: Announcing The*

of roaming on broadband wireless networks is important to the development of nationwide, ubiquitous, and competitive wireless voice telecommunications,” and was concerned that nascent competitors would be harmed by a lack of access to roaming, because “during the period in which broadband [PCS] systems are being built, market forces alone may not be sufficient to cause roaming to become widely available.”¹¹ In other words, the roaming requirements were expanded to include the newly minted licensees because a carrier building out its network to compete with other carriers would be the party most in need of roaming, but the party least likely to acquire roaming from its competitors. The Commission reaffirmed this concern in 2000¹² and 2005¹³ when it sought comment on whether to apply the roaming right to both manual and automatic roaming.¹⁴ This reasoning continues to be compelling for high-speed data services too.

Winning Bidders In The FCC's Auction of 99 Licenses To Provide Broadband PCS In Major Trading Areas: Down Payments Due March 20, 1995, Public Notice, PNWL 95-28 (rel. Mar. 13, 1995).

¹¹ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Second Report and Order and Third Notice of Proposed Rulemaking, 11 FCC Rcd 9462 ¶ 2 (1996) (“1996 Roaming Order”).

¹² *See Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services*, Notice of Proposed Rulemaking, 15 FCC Rcd 21628 ¶ 5 (2000).

¹³ *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers/Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 15047 ¶ 5 (2005).

¹⁴ This concern for new entrants was strangely and conspicuously absent from the Commission’s latest Order. For this reason, among others, SpectrumCo filed a Petition for Reconsideration of the *2007 Roaming Order*. See *SpectrumCo Petition* at 8-9. Specifically, SpectrumCo explained that the Commission’s “home roaming” exception effectively reverses previous Commission policy with regard to new entry, and should be revoked. The success of new potential entrants depends upon having access to a service - - roaming -- that can only be provided by the very companies who stand to gain the most from the failure of new entry.

B. Consumers Expect Nationwide Seamless Coverage From Their Wireless Services.

Consumer expectations are obviously an important touchstone of the Commission's wireless policy. In the *2007 Roaming Order*, the Commission noted that today's wireless consumers "increasingly rely on mobile telephony services and they reasonably expect to continue their wireless communications even when they are out of their home network area."¹⁵ As Commissioner Adelstein said, the "automatic roaming obligation will help all consumers have access to better coverage and service availability no matter where they live and where they travel. No customer should have to see the words 'No Service' on their wireless device when there is a compatible network available."¹⁶ In deciding to clarify the wireless E911 location accuracy requirements, all of the Commissioners recognized the important role played by consumer expectations.¹⁷ Consumer expectations should play an equally important role as the Commission considers taking action in this *Further Notice*.

Consumers have come to expect the ability to go anywhere and everywhere with their wireless devices, and that will only increase as the next generation of wireless networks is deployed. Qualcomm's Ultra Mobile Broadband ("UMB") -- the next generation of CDMA --

¹⁵ *2007 Roaming Order* ¶ 3.

¹⁶ *Id.*, Statement of Commissioner Adelstein, at 70.

¹⁷ *See, e.g., Wireless E911 Location Accuracy Requirements; Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Association of Public-Safety Communications Officials-International, Inc. Request for Declaratory Ruling; 911 Requirements for IP-Enabled Service Providers*, PS Dkt No. 07-114, CC Dkt No. 94-102, WC Dkt No. 05-196, Report and Order, FCC 07-166, Statement of Chairman Kevin J. Martin (rel. Sept. 11, 2007) (noting "that people are relying on cell phones for more and more of their calls, including calls to 911 . . . We need to make sure that our location accuracy requirements keep pace with these changes so that consumers can take advantage of all the opportunities wireless technology has to offer.").

will have speeds of “40 Mbps on the downlink and 10 Mbps on the uplink.”¹⁸ Its demonstration of the technology at CTIA Wireless 2007 highlighted the ability to have several “applications running simultaneously, including high-definition video streaming, high-quality video conferencing and voice over IP.”¹⁹ Nokia claims that Long Term Evolution (“LTE”) -- the next generation of GSM and UMTS -- “will deliver users the benefits of faster data speeds and new services by creating a new radio access technology that’s optimized for IP-based traffic....”²⁰ Sprint Nextel has already made substantial investment in deploying WiMAX technology, and expects that its service, called Xohm, will allow customers “to experience new interactive communications, high-speed Internet browsing, social networking tools, local and location-centric services, and multimedia services including music, video, mobile TV and on-demand products through a new Internet portal.”²¹ The ability of networks to deliver these services will only serve to increase consumers’ expectations, including their expectation that they will be able to access these services wherever they happen to be, as they do today with mobile voice services.

As the networks that will carry 4G services are being deployed, access to roaming on reasonable and non-discriminatory terms will be critical to their development. The evolution of the wireless marketplace to date strongly suggests that the development of a new generation of wireless services will serve to increase consumer expectations in this regard. At first, however,

¹⁸ Qualcomm, Inc., Press Release, *Qualcomm Introduces Complete Solution for Ultra Mobile Broadband* (Mar. 27, 2007), available at http://www.qualcomm.com/press/releases/2007/070327_complete_solution_ultra_print.html.

¹⁹ *Id.*

²⁰ Nokia, Press Backgrounder, *LTE -- Delivering the Optimal Upgrade Path for 3G Networks*, at 1, available at http://www.nokia.com/NOKIA_COM_1/Press/Press_Events/Nokia_Technology_Media_Briefing/LTE_Press_Backgrounder.pdf.

²¹ Sprint Nextel, Press Release, *Sprint Wins Industry Innovation Award In Best of WiMAX World USA Competition* (Sept. 27, 2007), available at http://www.xohm.com/news_092707.html.

ubiquitous nationwide service will be impossible to provide without roaming. As SpectrumCo explained in its Petition for Reconsideration, the Commission cannot expect new entrants to have to build out their entire networks before serving a single consumer.²² Access to roaming services on just and reasonable terms will be critical for new entrants to meet consumer expectations, regardless of whether they are deploying a 1G, 2G, 3G, 4G, or xG network.

New technological approaches and attendant new systems architectures should not lead to different, less consumer-friendly requirements unless there are compelling reasons for different treatment. When the Commission expanded the roaming right in 1996, it did so against the background of the PCS auctions. The Commission recognized that there would be technical differences that could come into play between existing cellular technologies and technologies deployed in the broadband PCS and SMR spectrum.²³ Nevertheless, the Commission also recognized the importance of roaming to the creation of a nationwide, seamless wireless “network of networks,” and expanded the roaming right, while making clear that “the rule does not require licensees to modify their systems in order to provide service to any end user.”²⁴ History has proven the wisdom of that decision, which continues to be relevant for the next generation of wireless systems.

Admittedly, it is still unclear what the next generation of wireless services is going to look like. Sprint Nextel, for example, has decided that WiMAX technology will provide it with

²² *SpectrumCo Petition* at 13.

²³ *See 1996 Roaming Order* ¶ 13.

²⁴ *Id.*

the capabilities to deliver the next generation of services.²⁵ Verizon and others have indicated that LTE may be the appropriate technology choice for delivering 4G services.²⁶ It is also unclear just what the “killer app” will be for 4G -- video? Internet/data? Business productivity? These are questions that the marketplace will answer in time, but they are not questions that should cause the Commission to rethink its dedication to automatic roaming.

The two questions raised by these uncertainties that might legitimately affect the Commission’s outlook on roaming are: (1) whether networks are technically compatible with subscribers’ terminal equipment, and (2) whether networks have sufficient capacity to accommodate roamers. Neither of these questions is novel. Technical compatibility has been an issue since the Commission decided to allow more than one cellular provider in a particular geographic area, and to address these concerns, it has always considered technical compatibility as a component of a “reasonable request” for roaming.²⁷ There is no reason the Commission cannot simply do so again.²⁸ The question of capacity is also a non-issue. Because incumbents

²⁵ See Sprint Nextel, Press Release, *Sprint Nextel Announces 4G Wireless Broadband Initiative with Intel, Motorola and Samsung* (Aug. 8, 2006), available at http://www2.sprint.com/mr/news_dtl.do?id=12960.

²⁶ See Kevin Fitchard, “VWZ, Vodafone Jointly Exploring LTE,” *Telephony Online*, Sept. 24, 2007, available at http://telephonyonline.com/wireless/technology/vzw_vodafone_lte_092107/.

²⁷ See *supra* nn. 23-24.

²⁸ As SpectrumCo has explained, treating roaming this way has an additional benefit for dealing with any potential issues that may arise as carriers begin to evolve from 2G and 3G networks to advanced 4G networks because of the manner in which it distributes evidentiary burdens. With automatic roaming as the norm, the obligation to demonstrate that it is infeasible for reasons of technological incompatibility or capacity constraints falls on the incumbents. This places the responsibility to come forward with factual information on the parties that possess it. This is important because 4G technologies and services will be innovative, a factor which, among other things, makes discrimination harder to identify with confidence. See Letter of Daniel K. Alvarez, Counsel to Comcast

are permitted to offer roaming services subject only to the “just and reasonable” requirements of Section 201, they will have the ability to assure the capacity necessary to serve their own customers.²⁹ As such, the Commission should not be concerned that “requiring a carrier to offer roaming service on its data network to the customers of other carriers resulted in the carrier facing capacity constraints that adversely affect its own customers.”³⁰

* * * *

The Commission’s desire to see competition enhanced in the wireless marketplace cannot stop with just its spectrum management policy. Consumers have come to expect nationwide seamless service, but new entrants will not be able to immediately provide a nationwide seamless network. Access to roaming will be a critical component of any new entrant’s ability to compete effectively against incumbents and, thus, will be a critical factor in determining whether competition continues to grow in the wireless marketplace.

III. GRANTING AN AUTOMATIC ROAMING RIGHT FOR ALL CMRS SERVICES IS WELL WITHIN THE COMMISSION'S AUTHORITY

In the *Further Notice*, the Commission notes that “[i]n the *Wireless Broadband Classification Order*, [the Commission] determined that mobile wireless broadband Internet access service is an information service, and that it is not CMRS” and asks “[i]f [the Commission] were to impose an automatic roaming obligation on mobile wireless broadband Internet access services, how could [it] do so in accordance with the determinations in that

Corporation, to Marlene H. Dortch, Secretary, FCC, WT Dkt No. 05-265 (filed June 20, 2007).

²⁹ See *2007 Roaming Order* ¶ 37.

³⁰ *Further Notice* ¶ 80.

order?”³¹ SpectrumCo submits that the question assumes too much -- the record is unclear as to whether high-speed data roaming qualifies as an “integrated” wireless broadband service. If data roaming is nothing more than high-speed wireless transmission, then it is clearly still a “commercial mobile service” subject to the requirements of Section 332 and relevant provisions of Title II.³² If, however, the Commission decides that high-speed data roaming does qualify as a wireless broadband service, it still has reserved for itself ample authority under Title III, reinforced by its Title I ancillary jurisdiction, to adopt an automatic roaming right for data roaming.

A. Automatic Data Roaming Is A Commercial Mobile Service Subject To Section 332 And Other Provisions Of Titles II and III.

The crux of the question asked by the Commission in the *Further Notice* is whether it has the authority over wireless broadband connections to adopt an automatic roaming right for high-speed data services. This question may be appropriate, but only if the Commission decides that high-speed data roaming is, in fact, a service that integrates transmission and other inputs in the fashion of broadband Internet access service. However, evidence in the record suggests that high-speed data roaming is *not* an information service. Instead, it is nothing more than the provision of transmission -- transmitting packets from the end user to the Internet or the home network across the host network. As explained below, this does not reach the level of integration with data service applications necessary to classify the service as an “information service,” and, as a result, high-speed data roaming remains a “commercial mobile service” subject to the requirements of Section 332 and related provisions of Titles II and III.

³¹ *Id.* ¶ 81 (footnotes omitted).

³² *See* 47 U.S.C. § 332(c)(1)(A).

One particular exchange on the record strongly merits the Commission's attention as it considers the regulatory classification of high-speed data roaming. On July 2, 2007, SouthernLINC, through its counsel, filed a letter demonstrating that data roaming is a wholesale telecommunications service.³³ SouthernLINC pointed out that "the host carrier does not change the form or content of the information sent to or received by the roamer, nor does the host carrier provide additional services or functionalities."³⁴ Verizon Wireless responded shortly thereafter, offering what it claimed to be a contrasting view of the regulatory status of high-speed data roaming.³⁵ However, the "information services" described in Verizon Wireless's response amount to little more than addressing and routing information.³⁶ Verizon Wireless says that "the host operator engages in the set up and authorization process and provides the end user with access to the home operator's network."³⁷ If that is all the host operator does, high-speed data roaming certainly does not qualify as a "wireless broadband service."

The Supreme Court's decision in *Brand X*, and the Commission's decision upon which *Brand X* was based, focused on the integration between applications -- e-mail, Web browsing,

³³ See Letter of Christine Gill, Counsel to SouthernLINC, to Marlene H. Dortch, Secretary, FCC, WT Dkt. No. 05-265 (filed July 2, 2007).

³⁴ *Id.* at 7.

³⁵ See Letter of Andre J. Lachance, Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, WT Dkt. No. 05-265 (filed July 20, 2007) ("*VZW Letter*"). Verizon Wireless spent a considerable portion of this letter arguing that roaming is not a wholesale service. As a jurisprudential matter, this distinction is irrelevant -- if roaming is simply transmission, it is a "commercial mobile service" subject to Section 332.

³⁶ See *id.*; see also Letter of Christine Gill, Counsel to SouthernLINC, to Marlene H. Dortch, Secretary, FCC, WT Dkt. No. 05-265, (filed July 24, 2007).

³⁷ *VZW Letter* at 2.

etc. -- and the transmission capability,³⁸ but that level of integration seems non-existent in the case of high-speed data roaming. Few would quarrel with Verizon Wireless's suggestion that e-mail, Internet browsing, photo transmission, and other data services "are indisputably classified as information services."³⁹ The problem with Verizon Wireless's position is that these services are being provided by the home operator, not the host operator. There is no evidence of integration between the transmission being provided by the host operator, and the applications and services being provided by the home operator.

Because high-speed data roaming is merely transmission, it still qualifies as a commercial mobile service subject to the relevant provisions of Titles II and III. Specifically, Section 332(c)(1)(A) says that "[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."⁴⁰ Further, even to the extent that the Commission has authority to "specify...as inapplicable" any common carrier provision of Title II, it "may not specify any provision of section 201, 202, or 208" as inapplicable.⁴¹ In other words, if the Commission concludes that high-speed data roaming is not an information service -- a conclusion strongly supported by the evidence in the record thus far -- the common carrier provisions of Sections 201, 202, and 208 should apply to high-speed data roaming.

³⁸ See, e.g., *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 990 (2005), *remanded*, *Brand X Internet Servs. v. FCC*, 435 F.3d 1053 (9th Cir. 2006) ("*Brand X*") ("the transmission component of cable modem service is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering.").

³⁹ *VZW Letter* at 2.

⁴⁰ 47 U.S.C. § 332(c)(1)(A).

⁴¹ *Id.*

B. The Commission Need Not Decide The Regulatory Classification Of High-Speed Data Roaming To Adopt An Automatic Roaming Right.

The Commission need not decide that high-speed data roaming is a commercial mobile service, nor even that it is an information service, before deciding whether it has the authority to adopt an automatic roaming right for such services. The Commission has sufficient authority -- whether it deems high-speed data roaming an information service, or simply decides not to address the question -- to adopt an automatic roaming right under Titles I and III.

Pursuant to Section 303(r) and other provisions of Title III,⁴² the Commission has plenary subject matter jurisdiction over the management *and use* of radio spectrum, authority which it specifically reserved for itself in the context of wireless broadband services. In the *Wireless Broadband Order*, the Commission emphasized that Title III's "provisions governing access to and use of spectrum (and their corresponding Commission rules) [are] not affected by whether the service using the spectrum is classified as a telecommunications or information service under the Act."⁴³ Thus, even in classifying wireless broadband Internet access services as information services, the Commission expressly reserved the right to regulate these services under Title III.

⁴² Among other things, Title III affords the Commission the power to regulate "radio communications" and the "transmission of energy by radio," *see generally* 47 U.S.C. §§ 301 *et seq.*; to adopt rules preventing interference, *see id.* §§ 302(a), 303; to establish a basic licensing scheme for radio stations, *see id.* §§ 307- 309, 312, 316; and to make such rules and regulations and prescribe such restrictions and conditions as may be necessary to carry out the provisions of the Act, *see id.* § 303(r).

⁴³ *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 ¶ 36 (2007) ("*Wireless Broadband Declaratory Ruling*").

Further, as the Supreme Court made clear in *Brand X*, the Commission has the authority under Title I to impose certain regulatory obligations on “information services.”⁴⁴ Pursuant to its Title I authority, the Commission may “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act as may be necessary in the execution of its functions.”⁴⁵ To determine whether it is proper to exercise its Title I ancillary jurisdiction, the Commission examines: (1) whether it has subject matter jurisdiction over the service to be regulated; and (2) whether the assertion of jurisdiction is reasonably ancillary to the effective performance of its responsibilities.⁴⁶ As to the first prong, Title III affords the Commission clear subject matter jurisdiction over wireless services.⁴⁷ As to the second prong, automatic roaming is already a critical component of the Commission’s pro-competition wireless policy, as reaffirmed by the Commission only weeks ago.⁴⁸ Adopting an automatic roaming right for high-speed data services is reasonably ancillary to the effective performance of the Commission’s responsibility to encourage competition, new entry, and the development of new services and technologies in the wireless marketplace. Both prongs of the ancillary jurisdiction analysis are easily satisfied.

The Commission has often invoked its ancillary jurisdiction to regulate services that are classified as “information services.” For example, the Commission used its ancillary jurisdiction to extend Section 255 accessibility obligations to providers of voicemail and interactive menu

⁴⁴ See *Brand X*, 545 U.S. at 996 (declaring that after designating cable modem service an information service, “the Commission remains free to impose special regulatory duties on facilities-based [information service providers] under its Title I ancillary jurisdiction”).

⁴⁵ 47 U.S.C. § 154(i).

⁴⁶ See *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

⁴⁷ See *supra* n.42.

⁴⁸ See *2007 Roaming Order* ¶ 3.

services and to the manufacturers of equipment needed to offer those services, even though Section 255 expressly applies only to telecommunications services and equipment, not to information services.⁴⁹ The Commission noted that because it had subject matter jurisdiction over the services and equipment involved, the implementation of the Communications Act would be thwarted if it did not use its ancillary jurisdiction.⁵⁰ Similarly, the Commission has subject matter jurisdiction over wireless licenses (and equipment) under Title III, and the purposes of the Act would be frustrated if the Commission did not use its ancillary jurisdiction to adopt an automatic roaming right.⁵¹

More recently, the Commission determined that it had ancillary jurisdiction to regulate the placement of Wi-Fi antennas used to provide information services.⁵² The Commission reasoned that the need for Wi-Fi antenna regulation exists regardless of the types of services that are provided through the antennas.⁵³ The Commission further noted that even if it had no other basis under the Act for regulating the antennas, its ancillary jurisdiction under Title I was

⁴⁹ *See Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417 ¶ 106 (1999). *See also* 47 U.S.C. § 255(c) (requiring that telecommunications service providers “shall ensure that the service is accessible to and usable by individuals with disabilities”).

⁵⁰ *See supra*, 16 FCC Rcd ¶ 106.

⁵¹ *See* 47 U.S.C. §§ 151, 309(j). *See also* Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 58 (1996).

⁵² *See In the Matter of Continental Airlines; Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices (OTARD) Rules*, Memorandum Opinion and Order, 21 FCC Rcd 13201, ¶¶ 4-5 (2006).

⁵³ *See id.* ¶ 41 (emphasizing that “the same types of restrictions on the same types of antennas unreasonably restrict deployment regardless of the services provided”) (footnote omitted).

sufficient to encompass Wi-Fi antennas providing information services.⁵⁴ Likewise, the argument for establishing an automatic roaming right for high-speed data roaming is the same regardless of the underlying service that a particular wireless device employs.

Perhaps most relevant, in its recent *Wireless Broadband Declaratory Ruling*, the Commission used its ancillary jurisdiction under Title I to apply the CPNI regulations to all wireless devices to “ensure that consumer protection needs are met by all providers of broadband Internet access services regardless of the underlying technology, *including providers of wireless broadband Internet access services.*”⁵⁵ If the Commission can regulate wireless broadband Internet access services for the purposes of protecting consumers’ privacy, the Commission can surely regulate wireless broadband Internet access services for the purpose of ensuring consumers have access to a seamless wireless network via automatic roaming requirements.

Finally, invoking its Title I ancillary jurisdiction in this context, regardless of whether high-speed data roaming is an information service, would be consistent with a long history of Commission precedent relying on ancillary jurisdiction over both non-classified and information services. For example, the Commission has repeatedly employed its ancillary jurisdiction under Title I to impose common carrier-like regulations on Voice over Internet Protocol (“VoIP”) services, even though the Commission has not yet classified VoIP as either an information service or a telecommunications services. In the VoIP context, the Commission has asserted its ancillary jurisdiction to: (1) require interconnected VoIP providers to provide E-911 services to

⁵⁴ See *id.* ¶ 40.

⁵⁵ See *Wireless Broadband Declaratory Ruling* ¶ 70 (citing to *Consumer Protection in the Broadband Era NPRM*, 20 FCC Rcd 14853 ¶¶ 146-59 (2005)) (emphasis added).

their customers;⁵⁶ (2) obligate interconnected VoIP providers to make contributions to the universal service fund;⁵⁷ (3) apply Section 222's customer proprietary network information ("CPNI") obligations to interconnected VoIP providers;⁵⁸ and (4) apply disability access requirements to all interconnected VoIP providers and related equipment manufacturers.⁵⁹ If the Commission has the authority to use its ancillary jurisdiction to regulate VoIP, a service that has not yet received a regulatory classification under the act, the Commission can surely invoke its ancillary jurisdiction to regulate wireless broadband Internet access services, especially where Title III provides the Commission with explicit authority over these services.

* * * *

The record evidence strongly suggests that high-speed data roaming is not an information service -- it is merely transmission, and, consequently, qualifies as a commercial mobile service that should be subject to the automatic roaming right. Nevertheless, because Title III affords the Commission broad latitude to regulate wireless devices to ensure seamless communications for customers, and because the Commission has authority under Title I to regulate "information services," it is irrelevant whether high-speed data roaming is an information service. The

⁵⁶ See *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 ¶ 1 (2005).

⁵⁷ See *Universal Service Contribution Methodology et al.*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 ¶¶ 38-49 (2006), *review granted in part, vacated in part, Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

⁵⁸ See *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 (2007).

⁵⁹ See *IP-Enabled Services; Implementation of Sections 255 and 251(a)(2) of The Communications Act of 1934 et al.*, Report and Order, 22 FCC Rcd 11275 ¶ 21 (2007) (noting that "even if interconnected VoIP services ultimately are determined to be information services rather than telecommunications services, Title I provides authority for the actions the Commission takes in this *Order*").

Commission has more than sufficient authority to apply the automatic roaming right to high-speed data roaming.

IV. AUTOMATIC ROAMING WILL NOT DIMINISH INCENTIVES TO INVEST IN OR BUILD OUT NETWORKS

The *Further Notice* asks whether “requiring roaming access to non-interconnected services and features [would] undermine carriers’ incentive to innovate, or to invest in mobile wireless broadband network facilities?”⁶⁰ There is no basis for a concern that automatic roaming will diminish incentives to invest in 4G or other networks or to build out licensed territories. Both new entrants and incumbents will have substantial reason to maximize the use of their licensed spectrum. These commercial incentives, of course, reinforce the regulatory requirements that wireless providers construct.

A. New Entrants Will Not Become Free Riders.

New entrants will not become and will not have an incentive to become free riders on incumbents’ networks. There are four reasons this is so. First, incumbents are permitted to charge appropriate prices for automatic roaming services, subject only to the constraint that the prices not violate the Section 201 requirement that they be just and reasonable. Second, and related to the first reason, new entrants will be impelled to build out their networks to better control the costs of conducting their businesses. Third, new entrants’ requirements to control quality and to provide their customers with a consistent experience will impel them to construct their own facilities. Fourth, new entrants are required to build out networks in their license areas by the terms of their licenses.

The Commission has not imposed any formulary regulation on the prices that can be charged for roaming services. Instead, the Commission has found that the “better course ... is

⁶⁰ *Further Notice* ¶ 79.

that the rates individual carriers pay for automatic roaming services be determined in the marketplace through negotiations between the carriers, subject to the statutory requirement that any rates charged be reasonable and non-discriminatory.”⁶¹ This determination and the venerable jurisprudence surrounding the Section 201 and 202 concepts⁶² ensure that incumbents will be fairly compensated for the automatic roaming services they provide. New entrants and others availing themselves of roaming services will not be receiving underpriced, let alone free, services.

Moreover, because the Commission’s determination that prices in the first instance will be determined by negotiations between incumbents and new entrants and because the Communications Act entitles regulated entities to charge prices affording an adequate return on investment, there is every reason to believe that firms with spectrum licenses likely will find it less expensive to provide services over their own networks than to buy them from others.⁶³ Experience with the cellular and PCS frequencies has shown that construction of national or even large regional networks is a time-consuming proposition and that facilities-based firms will find it necessary to commence service prior to the completion of their networks. In other words, their customers will have to rely upon roaming services to some extent. However, experience also has shown that they construct their own facilities, and make acquisitions where they do not have

⁶¹ *Id.* ¶ 37.

⁶² *See, e.g., Federal Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (establishing that “[i]t is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.”).

⁶³ To be sure, in some instances there will be insufficient demand to support more than one service provider. In those circumstances, the offering of roaming services and the addition of roaming revenues will help sustain, rather than impair, the underlying facility investment.

licenses, as quickly as prudence permits. One of the principal reasons for this is the critical importance of controlling their costs to the greatest extent possible. The business risks of relying on others' facilities, even when those facilities and attendant services are the object of particularized rate regulation, are evident in the difficulties, for example, of UNE resellers and, more recently, special access customers.

The ability to control quality to provide customers with a consistent, positive experience also will impel licensees to construct their own facilities. Wireless companies compete in several dimensions. Their advertising campaigns provide undeniable evidence that quality is one of the most important of those dimensions. It is entirely likely that quality will remain a major selling point for 4G services, just as it is for 2G and 3G services. If customers are "sold" on the basis of superior quality, they are very apt to want it available wherever they take their terminal devices.

Finally, regardless of the economic incentives at play, wireless licensees already have build-out requirements attached to their licenses. For example, in previous auctions, such as the AWS Auction, the Commission adopted a "substantial service" build-out requirement, which is defined as "service that is sound, favorable and substantially above the level of mediocre service that just might minimally warrant renewal."⁶⁴ The Commission has recognized that this standard balances the need for build-out with the practical realities of building out wireless networks.⁶⁵ In

⁶⁴ See *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162 ¶ 75 (2003), *modified on reconsideration*, 20 FCC Rcd 14058 (2005) ("2003 AWS Order"). Although this standard is not as exact as the standards adopted in the 700 MHz Order, the Commission concluded that "[t]his requirement provides the flexibility required to accommodate the new and innovative services that we believe will be forthcoming in these bands." *Id.*

⁶⁵ In the AWS Auction context, for example, the Commission noted that the substantial service standard "is particularly appropriate here because the incumbency of federal and

the 700 MHz proceeding, the Commission “adopted the strictest build-out rules ever implemented for wireless services.”⁶⁶ For example, “REAG licensees must provide signal coverage and offer service to at least 40 percent of the population in each [Economic Area (“EA”)] in its license area within four years and 75 percent of the population of each of these EAs at the end of the license term,”⁶⁷ “for licenses based on [Cellular Market Areas (“CMAs”)] and EAs, licensees must provide signal coverage and offer service to: (1) at least 35 percent of the geographic area of their license within four years of the end of the DTV transition, and (2) at least 70 percent of the geographic area of their license at the end of the license term.”⁶⁸ If the Commission decides that a particular licensee has not met its build-out requirements, regardless of whether such failure is due to incompetence, negligence, or a conscious decision to favor “piggybacking” instead of deploying its own network, the Commission already has the authority to reassign that license.⁶⁹ Accordingly, it need not use the denial of roaming rights as further incentive to build out high-speed wireless data networks.

other current licensees in these bands would make specific benchmarks for all new licensees inequitable.” *Id.* ¶ 76.

⁶⁶ Written Statement of Hon. Kevin J. Martin, Chairman, FCC, Before the Committee on Small Business, U.S. House of Representatives, at 3 (Oct. 10, 2007), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-277217A1.pdf (“*Martin Statement*”).

⁶⁷ *700 MHz Second Order* ¶ 163.

⁶⁸ *Id.* ¶ 157.

⁶⁹ In the context of the 700 MHz band proceeding, the Commission decided that failure to meet any of the interim requirements could result in a 2 year reduction of the license term, and that these licenses “will be subject to a “keep-what-you-use” rule, under which the licensee will lose its authorization for unserved portions of its license area.” *Id.* ¶ 153.

B. An Automatic Roaming Right Will Not Impair Incumbents' Incentives to Invest and Construct.

Equally important, incumbents' incentives to invest in network improvements and extensions will not be impaired by automatic roaming obligations.

As noted, transmission companies required to offer automatic roaming--those with compatible technology and sufficient capacity--are permitted to charge "just and reasonable" prices. This assures them of a fair return on their investment to the extent their network is used by roamers.⁷⁰ That should resolve any anxiety about the extent of inducements necessary to secure additional construction of communications facilities. Because of competition and regulation, telecommunications producers always have "shared" part of the benefits of their investments with consumers. The critical issue for public policy is striking a proper balance.⁷¹ Thus, while the major wireless companies understandably wish to appropriate to themselves as much of the surplus as possible, the fact that they have been unable to retain all of it has not prevented them from making extraordinarily large facility investments over the last 25 years and, assuming history is a useful guide, it will not prevent them from continuing to do so.⁷²

⁷⁰ Cf. *Time Warner Telecom, Inc. v. FCC*, No. 05-4769, *slip op.* at 31 (3d Cir. Oct. 16, 2007) (quoting the FCC's conclusion that "ILECs have 'an economic incentive to spread the costs of their networks over as much traffic and as many customers as possible regardless of whether such customers are wholesale or retail'" (internal quotations omitted)).

⁷¹ See, e.g., *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 429-30 (1999), *subsequent history omitted* (noting the importance of maintaining a proper balance in connection with the sharing requirements of Sections 251 and 252).

⁷² CTIA reports that wireless carriers have made a cumulative investment of over \$233 billion as of June 2007. See *CTIA's 2007 Semi-Annual Wireless Industry Survey*, available at http://files.ctia.org/pdf/CTIA_Survey_Mid_Year_2007.pdf. Since 1996, when the Commission expanded the manual roaming right to include all CMRS providers, the number of cell sites deployed by carriers nationwide has grown from 30,045 to 210,360. See *id.* Also, in the most recent CMRS Competition Report the FCC noted that "[o]ne analyst estimated that the wireless industry spent roughly \$25 billion on

While a sufficient return is a necessary inducement, it is not the only element impelling investment. Actual and potential competition from existing competitors and new entrants also will compel wireless firms to continue to invest in new and improved facilities, features, and functions.

For the last four decades, the Commission has been committed to the proposition that competition and its dynamic effects produce better results than any available alternatives.⁷³ The Commission's judgment was codified in the specific provisions and the underlying philosophy of the 1996 Telecommunications Act amendments to the Communications Act. The Commission's judgment favoring facilities-based competition also has been confirmed by the high level of investment and innovation in the parts of the economy over which the Commission exercises jurisdiction.⁷⁴ To put it bluntly, in workably competitive markets, firms invest because they must. In this instance, there cannot be any doubt about the Commission's judgment that the relevant wireless market is workably competitive. The decision to permit open competition--no exclusions, no spectrum cap limitations--in Auction 66⁷⁵ and in the impending Auction 73⁷⁶ permits no other interpretation. To put it simply, incumbent carriers will invest in new networks

capex in 2005, an increase of 18 percent from the \$22 billion spent in 2004, which in turn was on top of a 12 percent increase from 2003." *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Eleventh Report, 21 FCC Rcd 10947 ¶ 124 (2006) (footnote omitted).

⁷³ Earlier this month, Chairman Martin summarized this view in testimony to Congress: "Perhaps the most important factor spurring both increased broadband availability and reduced prices for individual consumers and for businesses is competition among broadband platforms." Martin Statement at 2.

⁷⁴ See, e.g., Howard A. Shelanski, *Competition and Deployment of New Technology in U.S. Telecommunications*, 2000 U. Chi. Legal F. 85 (2000).

⁷⁵ *2003 AWS Order* ¶ 67.

⁷⁶ See *700 MHz Second Order* ¶¶ 252-59.

because they will have to invest to survive in this competitive market. Automatic roaming for high-speed data services will not affect this fact.

V. CONCLUSION

The Commission's decision to clarify that automatic roaming is a common carrier right is an important step forward. The Commission must now take the next step, to protect consumers of the next generation of wireless services. Clarifying that high-speed data roaming services are also subject to the automatic roaming right is absolutely essential if the Commission expects the wireless marketplace to remain competitive and vibrant.

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