

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**SPRINT NEXTEL CORPORATION
REPLY COMMENTS**

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EXECUTIVE SUMMARY

The new data roaming rules sought by some commenters are incompatible with Commission precedent and would be inconsistent with the authority Congress has delegated to the Commission. The Commission should reaffirm its holding in the *Wireless Broadband Order* that wireless broadband internet access services are information services not subject to common carrier obligations. The Commission's decision was correct as a matter of policy and the United States Supreme Court has explicitly affirmed its legal analysis.

1. New Data Roaming Rules Would Be Incompatible with Commission Precedent

The Commission held only eight months ago that “neither the Communications Act nor relevant precedent requires a wireless broadband Internet access provider to offer the transmission component of wireless broadband Internet access services as a telecommunications service to anyone.” Proponents of new data roaming rules – which now want the Commission to reverse course – chose not to file reconsideration petitions in response to the *Wireless Broadband Order* and they may not now collaterally attack that decision in this docket.

The Commission has also already rejected the argument that it should invoke its ancillary authority to require broadband network providers to offer their networks to others on a common carrier basis – a fact that data roaming rules proponents understandably ignore. Rule proponents have not provided any reason, much less a good reason, for changing this precedent.

2. Congress Has Not Delegated to the Commission the Authority to Require Wireless Broadband Network Providers to Open Their Networks to Other ISPs on a Common Carrier Basis

Even if the Commission was free to ignore its prior precedent, the Commission may not lawfully exercise its ancillary authority to impose a common carrier roaming requirement on wireless network providers. Ancillary authority may be exercised only if the proposed regulation is “necessary to the Commission's execution of its statutorily prescribed functions.” Here, rule

proponents have failed to demonstrate that the data roaming rules they seek are necessary to further any statutory purpose – whether under Title I, Title II or Title III. In short, Commission invocation of its ancillary authority is inappropriate because there is no specific provision of the Communications Act that would be furthered by adoption of data roaming rules.

The Commission may not invoke its ancillary authority in a way that would contravene the basic parameters of the Act. Congress has made clear that information services providers should not be subject to a common carrier requirement that they serve indifferently other information services providers. Given the clarity with which Congress has spoken, the imposition of a mandatory, “serve indifferently”/common carrier data roaming obligation would be antithetical to the basic parameters of the Act.

3. There Is No Basis in Law to Impose a Data Roaming Mandate on Information Services Provided over Wireless Narrowband Data Networks

The throughput (or “speed”) with which data services are provided is irrelevant to whether a given service should be classified as an information service or telecommunications service. This classification is determined by the function that is made available. If, as the Commission has held, services provided over wireless broadband networks are information services and are not subject to a common carrier obligation to serve other ISPs, then the same result necessarily follows for wireless narrowband networks. This is particularly the case given that, as the Commission has recognized, many of the same information services are provided over both narrowband and broadband wireless data networks.

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Sprint Nextel Corporation (“Sprint Nextel”) submits the following reply comments in opposition to those parties urging the Federal Communications Commission (“FCC” or “Commission”) to adopt new mandatory roaming rules for providers of wireless broadband networks and other wireless information services.¹ The data roaming rules sought are incompatible with Commission precedent and would be inconsistent with the authority that Congress has delegated to the Commission.

I. NEW DATA ROAMING RULES WOULD BE INCOMPATIBLE WITH COMMISSION PRECEDENT

Those parties urging the Commission to impose roaming obligations on wireless broadband networks and wireless information services fail to distinguish the Commission’s prior decisions in this area. The Commission has already addressed this issue in an unequivocal manner, finding that it is not in the public interest to impose common carrier obligations on wireless internet access services or other information services. The only precedent cited by these commenters is either consistent with these holdings or distinguishable on other grounds.

¹ See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, *Further Notice of Proposed Rulemaking*, FCC 07-143, (Aug. 16, 2007), published in 72 Fed. Reg. 50085 (Aug. 30, 2007)(“*Data Roaming NPRM*”).

A. DATA ROAMING RULES WOULD CONFLICT WITH THE *WIRELESS BROADBAND ORDER*

The Commission held only eight months ago that wireless broadband networks constitute information services and that “neither the Communications Act nor relevant precedent requires a wireless broadband Internet access provider to offer the transmission component of wireless broadband Internet access services as a telecommunications service *to anyone*.”² This ruling is consistent with the Commission’s other broadband orders,³ and the Supreme Court has affirmed the legal analysis the Commission utilized in these orders.⁴ For all practical purposes, the *Wireless Broadband Order* decided the very legal issue raised in the *Roaming Further NPRM*, as Sprint Nextel has previously explained.⁵

Proponents of new data roaming rules nonetheless claim that new data roaming rules would be “wholly consistent” with, and “fully supported” by, the *Wireless Broadband Order*.⁶ Such assertions lack all merit. To be sure, the Commission in this *Order* did hold that a wireless broadband network owner *may “choose” voluntarily* to offer the telecommunications transmission component as a telecommunications service.⁷ But the Commission also made unmistakably clear that wireless broadband network providers are ***not required*** to offer others access to the transmission component of their networks:

² *Wireless Broadband Order*, 22 FCC Rcd 5901, 5913 ¶ 32 (March 23, 2007)(emphasis added).

³ *See Wireline Broadband Order*, 20 FCC Rcd 14853 (2005), *aff’d Time Warner v. FCC*, 2007 U.S. App. LEXIS 24204 (3d Cir., Oct. 16, 2007); *Cable Broadband Order*, 17 FCC Rcd 4798 (2002), *aff’d NCTA v. Brand X*, 545 U.S. 967 (2005); *BPL Broadband Order*, 21 FCC Rcd 13281 (2006).

⁴ *See NCTA v. Brand X*, 545 U.S. 967 (2005).

⁵ *See* Sprint Nextel Comments at 1-3.

⁶ Southern Comments at 30 and 32. *See also* Leap Comments at 3; Rural Cellular Association (“RCA”) Comments at 6.

⁷ *Wireless Broadband Order*, 22 FCC Rcd at 5913-14 ¶ 33.

We also make clear that no aspect of the *Computer Inquiry* regime applies to the provision of wireless broadband Internet access service. In particular, as noted above, *no provider of wireless broadband Internet access service has an obligation to provide the transmission component of that service as a common carrier service*, regardless of whether the provider is otherwise a common carrier.⁸

There is, therefore, no basis whatsoever to the rule proponents' assertion that adoption of mandatory, common carrier data roaming rules would be "consistent with" the *Wireless Broadband Order*.

The proponents of new data roaming rules chose not to file reconsideration petitions in response to the *Wireless Broadband Order*, and they may not now collaterally attack the Commission's determination that wireless broadband internet access services are information services not subject to common carrier regulation in this docket.⁹ Moreover, given the notice requirements of the Administrative Procedures Act ("APA"), it is questionable whether the Commission could even reconsider in this docket its holding in the *Wireless Broadband Order*, since a vacation of the *Wireless Broadband Order* would negatively impact all broadband network providers, many of whom have received no notice that the Commission was contemplating a reversal of one of the core holdings in its *Broadband Orders*.¹⁰

⁸ *Id.* at 5914 ¶ 34 (emphasis added). The FCC held that "subjecting" wireless broadband network providers to these obligations would "disserve the goals of section 706 of the Telecommunications Act of 1996." *Id.*

⁹ *See, e.g., Private Land Mobile Radio Frequency Coordination*, 14 FCC Rcd 12752 12757-58 ¶ 11 (1999)("[I]ndirect challenges to Commission decisions that were adopted in proceedings in which the right to review has expired are considered impermissible collateral attacks and are properly denied."); *Low Power Private Land Mobile Operations*, 19 FCC Rcd 18501, 18504 ¶ 10 (2004)("To the extent the AAPC petition indirectly challenges earlier Commission decisions, it is also procedurally flawed because it is an impermissible collateral attack on final Commission decisions.").

¹⁰ A FCC holding that the transmission component of wireless broadband networks is also a separate telecommunications service (in addition to an integrated information service) necessarily would undermine the same holdings in the *Cable Modem*, *Wireline* and *BPL Broadband Orders*.

B. THE COMMISSION HAS ALREADY REJECTED THE ARGUMENT THAT IT SHOULD INVOKE ITS ANCILLARY AUTHORITY TO REQUIRE BROADBAND NETWORK PROVIDERS TO OFFER THEIR NETWORKS TO OTHERS ON A COMMON CARRIER BASIS

Proponents of new data roaming rules claim that the Commission has “clear” and “ample” authority to adopt such rules pursuant to its ancillary authority.¹¹ Not surprisingly, perhaps, these rule proponents neglect to acknowledge the fact that the Commission has already rejected this very argument:

[W]e decline to mandate, through our Title I ancillary jurisdiction, that the transmission component of BPL-enabled Internet access service provided as a wholesale input to ISPs, including affiliates, be offered as a telecommunications service.”¹²

The Commission determined that “subjecting BPL-enabled Internet access service providers to these obligations would disserve the goals of section 706 of the 1996 Act.”¹³

The Commission reached the same conclusion in its *Wireline Broadband Order*. The Commission held in this *Wireline Order* that its *Computer II* rules, which had been adopted pursuant to its ancillary authority, should no longer apply to wireline broadband internet access networks:

[A]ll wireline broadband Internet access service providers are no longer subject to the *Computer II* requirement to separate out the underlying transmission from wireless broadband Internet access service and offer it on a common carrier basis.¹⁴

¹¹ See, e.g., Leap Comments at 3; MetroPCS Comments at 13; Southern Comments at 43-47.

¹² *BPL Broadband Order*, 21 FCC Rcd 13281, 13290 ¶ 15 (2006).

¹³ *Id.*

¹⁴ *Wireline Broadband Order*, 20 FCC Rcd 14853, 14876 ¶ 41 (2005), *aff'd Time Warner v. FCC*, 2007 U.S. App. LEXIS 24204 (3d Cir., Oct. 16, 2007).

In so ruling, the Commission specifically rejected arguments that “equate the ability of *ISPs* to obtain wireline broadband transmission services on a Title II basis with the ability of *consumers* to obtain facilities-based competitive broadband Internet access services”:

A regulatory regime that promotes a competitive broadband Internet access services market where consumers have a choice of multiple providers is not necessarily the same as a regulatory regime that mandates that one particular type of broadband Internet access service transmission, and one alone, is available, on nondiscriminatory basis, to any entity that desires to become an ISP. Vigorous competition between different platform providers already exists in many areas and is spreading to additional areas.¹⁵

Proponents of new data roaming rules understandably ignore this precedent in their comments, and they make no attempt to demonstrate that this recent – and uniform – precedent is erroneous or should otherwise be changed. Indeed, any such action by the Commission on the current record would be legally problematic. Courts have held that an agency “may of course alter its positions over time, but the agency acts arbitrarily when it departs from its precedent without giving any good reason.”¹⁶ Here, parties advocating new rules have provided no reason, much less a “good reason,” for changing its precedent.

II. CONGRESS HAS NOT DELEGATED TO THE COMMISSION THE AUTHORITY TO ADOPT COMMON CARRIER OBLIGATIONS ON PROVIDERS OF WIRELESS BROADBAND NETWORKS

The Commission must reject the data roaming proposals because they are incompatible with the precedent discussed above. However, the Commission would be required to reject these proposals even if this precedent did not exist. This is because the rule proponents have failed to

¹⁵ *Id.* at 14885-86 ¶ 62 (emphasis in original).

¹⁶ *PDK Labs. v. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004). *See also Williams Gas v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006) (“[I]t is axiomatic that [agency action] must either be consistent with prior [action] or offer a reasoned basis for its departure from precedent.”); *ExxonMobile v. FERC*, 487 F.3d 945, 960 (D.C. Cir. 2007) (“Of course, FERC may not depart from its own precedent without a reasoned explanation.”).

demonstrate that the Commission may lawfully exercise its ancillary authority to impose a common carrier roaming requirement on wireless and other broadband network providers.

The Commission may exercise ancillary authority only if two conditions are met. First, the subject of the regulation must be covered by the Commission's grant of jurisdiction under Title I of the Communications Act, which encompasses "all interstate and foreign communication by wire or radio."¹⁷ Wireless and other broadband networks unquestionably fall within this general jurisdictional grant.

Second, the proposed rules must also be "necessary to the Commission's execution of its statutorily prescribed functions."¹⁸ To meet this second condition, the Commission must reference specific provisions of the Act and show how the proposed rules would serve "a purpose affirmatively to promote the goals" in this referenced statute – the "requirement's nexus to such [statutory] goals."¹⁹ Specifically, courts will affirm rules adopted with ancillary authority only if the regulation "was imperative to prevent interference" with the Commission's "statutory responsibilities."²⁰ Here, the rule proponents have failed to demonstrate that data roaming rules they seek are "necessary in the execution of [the FCC's statutory] functions" – whether under Title I, Title II or Title III.

¹⁷ 47 U.S.C. § 152(a).

¹⁸ *IP-Enabled Services*, 19 FCC Rcd 4863, 4895 ¶ 46 (2004). This limitation is apparent from Section 4(i) of the Act, which empowers the FCC to adopt rules "not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). See also 47 U.S.C. § 303(r); *Midwest Video II*, 440 U.S. at 706 (Proposed rules must be "necessary to ensure the achievement of the Commission's statutory responsibilities."); *id.* at 706 (the regulation must be "imperative"); *Motion Pictures Ass'n v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002).

¹⁹ *FCC v. Midwest Video*, 440 U.S. 689, 702 (1979) ("Midwest Video II").

²⁰ *Id.* at 706-07.

A. A DATA ROAMING MANDATE IS NOT NECESSARY TO EFFECTUATE THE POLICIES IN TITLE I OF THE COMMUNICATIONS ACT

Completely without merit is the assertion that Sections 1 and 2(a) of the Act empower the Commission to adopt data roaming rules pursuant to its ancillary authority.²¹ The Supreme Court has held that Section 2(a), by itself, does not justify the exercise of ancillary authority, because the Commission must additionally “reference [other] provisions of the Act”:

But without reference to the provisions of the Act directly governing [the subject at hand], the Commission’s jurisdiction under § 2(a) would be unbounded. Though afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority.²²

In other words, Section 2(a) determines whether the Commission possesses subject matter jurisdiction – the first condition for the exercise of ancillary authority. This statute has no relevance to the separate question whether the proposed rules are “imperative” or “necessary to ensure the achievement of the Commission’s statutory responsibilities.”²³

Courts have similarly held that Section 1, by itself, does “not give the FCC unlimited authority to act as it sees fit with respect to all aspects of [the subject of the proposed rules], without regard to the scope of proposed regulations.”²⁴ Rather, the Commission “must find its authority in provisions other than § 1”:

Because the FCC can point to no other statutory authority, the [rules on appeal] must be vacated. What is determinative here is the FCC acted without delegated authority from Congress. Section 1 does not furnish the authority sought.²⁵

²¹ See Leap Comments at 3; MetroPCS Comments at 13; Southern Comments at 44-45.

²² *Midwest Video II*, 440 U.S. at 706.

²³ *Id.*

²⁴ *Motion Picture Ass’n v. FCC*, 309 F.3d 796, 798, 803 (D.C. Cir. 2002).

²⁵ *Id.* at 799, 804 and 807. See also *California v. FCC*, 905 F.2d 1217, 1240 (9th Cir. 1990) (“Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission’s specific statutory responsibilities.”). For example, in *Midwest Video I*, the Supreme Court affirmed rules adopted pursuant to the FCC’s ancillary authority because the rules “serve

Notably absent in the rule proponents' comments is any reference to the Title I provision most relevant to this proceeding – namely, Section 706 of the 1996 Act.²⁶ This omission is understandable, given that the Commission has already held that requiring wireless broadband network providers to make available to others the transmission component of their networks would “disserve the goals of section 706.”²⁷

In summary, there is nothing in Title I that would justify Commission exercise of its ancillary authority to impose a data roaming requirement on broadband network providers. To the contrary, the Commission has squarely held that “subjecting wireless broadband Internet access service providers to these obligations would *disserve* the goals of section 706.”²⁸

B. A DATA ROAMING MANDATE IS NOT NECESSARY TO EFFECTUATE THE POLICIES IN TITLE II OF THE COMMUNICATIONS ACT

Rule proponents also assert that Title II of the Act justifies invocation of ancillary authority to impose data roaming rules.²⁹ They specifically reference a series of orders where the Commission imposed on VoIP providers certain consumer protection provisions contained in Title II.³⁰

These VoIP orders do not support the imposition of data roaming rules. First, these decisions were limited to interconnected VoIP services, a voice application that competes with tradi-

the policies of §§ 1 and 303(g) of the Communications Act.” *Midwest Video I*, 406 U.S. 649, 669 (1972) (emphasis added).

²⁶ See Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153, *codified at* 47 U.S.C. § 157 note.

²⁷ *Wireless Broadband Order*, 22 FCC Rcd at 5914 ¶ 34.

²⁸ *Id.* (emphasis added)

²⁹ See Southern Comments at 32-43.

³⁰ See Leap Comments at 3; Southern Comments at 32-43 and 46. Southern also relies on the FCC's *Time Warner Order* (*id.* at 34-35, 38-39) – even though this decision has no relevance here because it did not involve exercise of ancillary authority, but rather a telecommunications service and the interconnection obligations under Section 251 applicable to such services.

tional telephone services; they did not involve non-interconnected services, including data services.³¹ These decisions were also limited to subjects the Commission determined were necessary to protect consumers, as opposed to here, where rule proponents want the government to intervene so as to protect them from competitors who took the risk of building larger broadband networks.³²

More fundamentally, in each of these VoIP cases the Commission cited and relied on a specific provision in Title II, further explaining how the policies in these statutes would be promoted by the exercise of ancillary authority.³³ Notably absent in the rule proponents' comments is a reference to any specific Title II provision, the policies of which would be furthered by the adoption of data roaming rules.

The Title II statute that is most relevant to intercarrier data roaming is Section 251(c), which obligates large incumbent LECs to affirmatively assist their competitors under certain circumstances. This statute, however, *undermines* a new data roaming mandate because (a) Congress limited this obligation to dominant carriers with market power, deliberately choosing not to apply this obligation to wireless carriers, and (b) the Commission removed this Section 251(c) obligation for incumbent LEC fiber-based broadband networks because such an obligation would disserve the goals of Section 706 of the Act.³⁴ If, as the Commission has held, incumbent LECs

³¹ See, e.g., *VoIP LNP Order*, WC Docket No. 04-36, FCC 07-188, at ¶ 18 (Nov. 8, 2007) (“Consistent with our previous decisions . . . , we limit our decision to interconnected VoIP providers, in part because, unlike certain other IP-enabled services, we continue to believe that interconnected VoIP service ‘is increasingly used to replace analog voice service.’”).

³² See, e.g., *id.* at ¶ 16 (“In this *Order*, we undertake several steps to help ensure that consumers and competition benefit from LNP as intended by the Act and Commission precedent.”).

³³ For example, in its most recent VoIP order, the FCC determined that extending LNP obligations to interconnected VoIP providers would promote the policies specified in Sections 251(b)(2) and 251(e), and Section 706 of the 1996 Act. See *id.* at ¶¶ 26-29.

³⁴ See Sprint Nextel Comments at 8.

with market power should not be required to open their broadband internet access networks to others, there certainly is no basis in law or policy to impose such obligations on competitive wireless carriers.

In summary, there is nothing in Title II that would justify Commission exercise of its ancillary authority to impose a data roaming requirement on wireless broadband network providers. To the contrary, given the Congressional determination that, at most, only the largest incumbent LECs should be required to affirmatively assist their competitors (and then, only under specified circumstances) and given the Commission's decision that even this obligation should not apply to the incumbents' new broadband networks, there is no basis at all for the Commission to find that the policies contained in Title II somehow warrant the imposition of data roaming requirements on wireless carriers.

C. A DATA ROAMING MANDATE IS NOT NECESSARY TO EFFECTUATE THE POLICIES IN TITLE III OF THE COMMUNICATIONS ACT

The proponents of new rules finally assert that data roaming rules would be justified under the Commission's Title III authority over radio spectrum, suggesting that this authority gives the Commission *carte blanche* to adopt whatever rules it wants to adopt, so long as it finds the proposed rules are in the public interest.³⁵ In fact, the Commission's Title III authority has no relevance to this docket, and the invocation of this authority would not justify new data roaming rules.

Title III and the public interest standard contained in Section 303(r) do not give the Commission unrestrained authority to adopt any rules applicable to radio licenses. As the D.C. Circuit held in rejecting the position now repeated by the rule proponents:

³⁵ See Southern Comments at 25 ("The key test under Title III is the public interest."); Leap Comments at 4.

The FCC cannot act in the “public interest” if the agency does not otherwise have the authority to promulgate the regulations at issue. An action in the public interest is not necessarily taken to “carry out the provisions of the Act,” nor is it necessarily authorized by the Act. The FCC must act pursuant to *delegated authority* before any “public interest” inquiry is made under § 303(r).³⁶

It is understandable that the rule proponents cite to no specific provision in Title III that would be advanced by mandatory data roaming rules, given that Title III addresses such subjects as the allocation of radio spectrum, the assignment of radio licenses, interference and other technical issues unique to radio.³⁷

Courts have further recognized that with regard to information services, the relevant portion of the Act is Title II, not Title III:

Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission’s specific statutory responsibilities. In the case of enhanced services, the specific responsibility to which the Commission’s Title I authority is ancillary to its Title II authority is over common carrier services.³⁸

Indeed, rule proponents concede as much in asserting that the Commission should exercise its Title III authority to impose Title II obligations – “including Section 201 and 202 obligations” – on wireless broadband network providers.³⁹ But as discussed above, there is no specific Title II provision that would be furthered by imposition of a data roaming mandate.

³⁶ *Motion Picture Ass’n*, 309 F.3d at 804 and 806 (emphasis in original).

³⁷ Southern cites to the FCC’s recent decision to impose an “open access” requirement on one of the five 700 MHz blocks that will be auctioned in January, action the FCC took to “further the objectives of Section 309(j)(3)(A).” *Second 700 MHz Service Rules Order*, 22 FCC Rcd 15289 at ¶ 215 (Aug. 10, 2007). The auction statute, however, has no relevance to this proceeding where the FCC is considering adoption of new rules to firms that have already acquired their licenses.

³⁸ *California v. FCC*, 905 F.2d 1217, 1240 (9th Cir. 1990).

³⁹ See Southern Comments at 31. Southern apparently takes the position that the FCC could impose a Title II common carrier obligation on wireless carriers (because of its Title III radio authority), but could not impose the same Title II common carrier obligation on landline carriers (because they are not subject to Title III).

Data roaming rule proponents do cite to two FCC orders in support of their Title III argument. Leap cites to the 1996 *Roaming Order* where the Commission “noted” that Title III provided authority to adopt roaming rules as a license condition.⁴⁰ But as the Commission did not adopt any roaming rules in that *Order*, this passing reference to Title III was at best *dicta*. In addition, the 1996 *Roaming Order* contained no legal analysis at all of the FCC’s Title III authority.⁴¹ *Dicta* – and particularly unexplained *dicta* – are not entitled to any precedential weight.

Southern alternatively relies on the 1996 *CMRS Resale Order* for the proposition that the Commission may exercise its Title III authority over wireless information services such as voice mail in imposing a Title II common carrier obligation to assist competitors *via* resale.⁴² At least three points are noteworthy about this “precedent”:

1. This *Order* imposed a resale obligation without any discussion of how Title III justified such action (*e.g.*, the citation to a Title III statute, the goals of which would be promoted by imposing a common carrier obligation on certain information services);⁴³
2. The Commission imposed a common carrier resale obligation because voice mail was bundled with voice services, with the FCC “concerned that excluding from the resale rule all bundled packages that include non-Title II components would potentially offer carriers an easy means to circumvent the rule;”⁴⁴

⁴⁰ See Leap Comments at 4.

⁴¹ The extent of the FCC’s discussion of Title III was limited to the following sentence: “We also note that we have authority to impose a roaming requirement in the public interest pursuant to our license conditioning authority under Sections 303(r) and 309 of the Act.” *1996 Roaming Order*, 11 FCC Rcd 946, 9469 ¶ 10 (1996).

⁴² See Southern Comments at 27-29.

⁴³ See *CMRS Resale Order*, 11 FCC Rcd 18455, 18472 ¶ 31 (1996). Earlier in the *Order*, the FCC mentioned Title III as the basis for its decision, again without any discussion of its Title III authority. See *id.* at 18459 ¶ 7. The FCC likewise did not discuss its Title III authority in its reconsideration order because it summarily dismissed the reconsideration petitions on this issue as “[n]o party has challenged our explicit invocation of title III as a basis for imposing the resale rule.” *CMRS Resale Reconsideration Order*, 14 FCC Rcd 16340, 16353 ¶ 27 (1999).

⁴⁴ *CMRS Resale Order*, 11 FCC Rcd at 8472 ¶ 31.

- in this docket, in contrast, there is no physical bundling of telecommunications and information services, as they are provided over separate networks;
3. The 1996 *CMRS Resale Order* must be read in light of the more recent 2007 *Wireless Broadband Order*, where the FCC specifically determined that the goals of Section 706 the 1996 Act would be “disserved” by requiring wireless broadband network owners to provide access to their networks on a common carrier basis.

Given that the *CMRS Resale Order* contains no analysis at all concerning the scope of the Commission’s Title III authority, the *Order* hardly constitutes “valuable precedent” as Southern claims.⁴⁵

It is further worth noting that both of the decisions cited by rule proponents were issued in 1996, when PCS licenses were just being auctioned and wireless services were still in a relatively nascent state. The market for wireless services has changed dramatically in the past eleven years with vastly expanded competition and the entry of multiple national providers. Given the lack of any evidence of a market failure, there is no basis on which to impose new conditions on licenses that were issued more than ten years ago.

The Commission’s authority under Title III is not without limitation and Title III’s existence alone does not justify the exercise of ancillary authority to impose a new common carrier data roaming requirement on wireless broadband network providers.

D. CONGRESS HAS MADE CLEAR THAT THE COMMISSION MAY NOT IMPOSE A “SERVE INDIFFERENTLY” COMMON CARRIER OBLIGATION ON INFORMATION SERVICES PROVIDERS

Commission invocation of its ancillary authority is inappropriate because there is no specific provision of the Communications Act that would be furthered by adoption of data roaming rules. However, adoption of data roaming rules could not be justified even if the rule proponents had identified a specific provision of the Act, because Congress has foreclosed use of a common

⁴⁵ See Southern Comments at 27.

carrier obligation on information services providers (“ISPs”) as a means to accomplish its statutory objectives.

Congress has made clear that ISPs may not be regulated as common carriers, as Sprint Nextel has previously documented.⁴⁶ The Commission itself has recognized that Congress’s goal is to “encourag[e] the development of information services by ensuring that they remain free from common carrier regulation”:⁴⁷

Congress has clearly indicated that information services are not subject to the economic and entry/exit regulation inherent in Title II.⁴⁸

The primary *sine qua non* of common carrier status is the requirement to “serve indifferently all potential users.”⁴⁹ If a firm is not a common carrier, it may determine in each particular case “whether and on what terms to service, and there is no specific regulatory compulsion to serve all indifferently.”⁵⁰

The Supreme Court has held that the Commission may not invoke ancillary authority when the rules being proposed are “inconsistent with the Act.”⁵¹

The purpose of [Section 3(h)] and its mandatory wording preclude Commission discretion to compel broadcasters to act as common carriers. . . . [T]hat same constraint applies to the regulation of cable television systems.⁵²

The Commission itself has recognized that rules adopted pursuant to its ancillary authority “cannot be antithetical to a basic regulatory parameter” contained in the Act.⁵³ Given the clarity with

⁴⁶ See Sprint Nextel Comments at 5-9.

⁴⁷ *Wireless Broadband Order*, 22 FCC Rcd at 5921 ¶ 56.

⁴⁸ *pulver.com*, 19 FCC Rcd 3307, 3320 n.69 (2004).

⁴⁹ *SBC v. FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994), quoting *NARUC v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976).

⁵⁰ *Cable Broadband Order*, 17 FCC Rcd 4798, 4830 ¶ 55 (2002).

⁵¹ *U.S. v. Southwestern Cable*, 392 U.S. 157, 180 (1968).

⁵² *Midwest Video II*, 440 U.S. 689, 705 (1979).

which Congress has spoken, the imposition of a mandatory, “serve indifferently”/common carrier data roaming obligation would be antithetical to the basic parameters of the Act.

III. THERE IS NO BASIS IN LAW TO IMPOSE A DATA ROAMING MANDATE ON INFORMATION SERVICES PROVIDED OVER WIRELESS NARROW-BAND DATA NETWORKS

All three parties addressing the Commission’s inquiry concerning narrowband data services agree that treating wireless narrowband and broadband data services differently is “unworkable” and “completely impractical.”⁵⁴ As the Commission has previously recognized, many of the same information services are provided over both narrowband and broadband data networks.⁵⁵ The Commission has further recognized that some wireless technologies generally considered to be narrowband (*e.g.*, 1xRTT) have “peak data rates of 307 kbps in mobile environments” – or throughput rates that meet the definition of broadband services.⁵⁶

One party, however, assumes that services provided over narrowband networks are “non-information services”⁵⁷ without making any attempt to explain this assumption. The throughput (or “speed”) with which data services are provided is irrelevant to whether a given service should be classified as an information service or a telecommunications service.⁵⁸ Whether a service is a

⁵³ *VoIP LNP Order*, WC Docket No. 04-36, FCC 07-188, at n.76 (Nov. 8, 2007).

⁵⁴ MetroPCS Comments at 11-12. *See also* Verizon Wireless Comments at 4; Southern Comments at 22.

⁵⁵ *See Wireless Broadband Order*, 22 FCC Rcd at 5909 ¶ 11 (“Wireless broadband networks . . . provide access to the applications available on the slower networks.”). *See also* Verizon Wireless Comments at 4 n.12.

⁵⁶ *Eleventh CMRS Competition Report*, 21 FCC Rcd 10947 at ¶ 108 (2006).

⁵⁷ *See* MetroPCS Comments at 11.

⁵⁸ The broadband/narrowband distinction is important for application of the policies set forth in Section 706 of the 1996 Act, but as discussed in the text, this distinction is irrelevant to a legal analysis whether a given service is a telecommunications or information service. This broadband/narrowband distinction is also irrelevant in determining whether a given service is CMRS or not, because Congress has determined that non-interconnected mobile services are not CMRS. *See* 47 U.S.C. § 332(d).

telecommunication service or an information service, the Commission has held, depends not on “the particular type of facilities used,” but rather on “the function that is made available” to consumers.⁵⁹ There is nothing in the statutory definition of information services which suggests that the information must be transmitted at a minimum throughput rate before it can be classified as an information service.⁶⁰ In this regard, it is noteworthy that at the time the Commission established the enhanced services category over 20 years ago (the precursor to the 1996 Act’s information services category), most enhanced services were provided at throughput rates between 2.4 and 56 kbps – or rates below those available on wireless narrowband data networks such as 1xRTT and GPRS/EDGE.⁶¹

If, as the Commission has held, wireless broadband Internet access services are information services, then wireless narrowband Internet access services necessarily are information services as well. The Commission may not lawfully impose a common carrier roaming obligation on providers of wireless broadband internet access networks, and the same result necessarily follows for wireless narrowband networks.

IV. CONCLUSION

For the foregoing reasons, Sprint Nextel respectfully requests that the Commission terminate the *Data Roaming NPRM* and reaffirm its holdings in the *Wireless Broadband Order*, which adopts a legal analysis that the U.S. Supreme Court has explicitly affirmed.

⁵⁹ *Cable Modem Declaratory Order*, 17 FCC Rcd 4798, 4821 ¶ 35 (2002). *See also Universal Service Report to Congress*, 13 FCC Rcd 11501, 11530 ¶ 59 (1998) (“A functional approach is consistent with Congress’s direction that the classification of a provider should not depend on the type of facilities used . . . [but] rather on the nature of the service being offered to consumers..”).

⁶⁰ *See* 47 U.S.C. § 153(20)(definition of information service).

⁶¹ *See e.g.*, *AT&T Comparably Efficient Interconnection Plan*, 4 FCC Rcd 4544 (1989); *Open Network Architecture Plans*, 4 FCC Rcd 2449 (1988); *AT&T Tariff No. 260*, 101 F.C.C.2d 144 (1985); *AT&T Packet Switch Order*, 94 F.C.C.2d 48 (1983); *AT&T Tariff No. 270*, 91 F.C.C.2d 1 (1982).

Respectfully submitted,

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