

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

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

REPLY COMMENTS OF VERIZON WIRELESS

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SUMMARY

The FCC should not extend the CMRS automatic roaming requirement to non-interconnected services or features, including services that have been classified as information services, such as wireless broadband Internet access service, or other non-CMRS services offered by CMRS providers.

The Commission lacks legal authority to extend the automatic roaming obligation to the services addressed in the FNPRM. The recent *Wireless Broadband Internet Access Declaratory Ruling* (“*WBIA Ruling*”) – in which the Commission definitively concluded that wireless broadband Internet access services are information services and not CMRS – precludes imposition of the common carrier-based automatic roaming regulatory requirements contemplated in this proceeding. The Commission’s analysis in that ruling must be extended to narrowband information and other non-interconnected data services, as well. These narrowband offerings, from the perspective of classification, possess the same characteristics as wireless broadband Internet access services, albeit at slower throughput rates.

Commenters’ arguments that Title II applies to data roaming notwithstanding the *WBIA Ruling* must also fail. These arguments ignore longstanding precedent and analyze roaming as a service between two carriers, rather than as an end-user service. The Commission has already rejected this approach both in the 1996 Order adopting a manual roaming obligation for CMRS providers and in the Report and Order in this proceeding.

Moreover, neither Title I nor Title III provides a jurisdictional basis to extend the automatic roaming obligation to information and non-interconnected services. Recent FCC decisions have consistently maintained that broadband Internet access services are information

services and are exempt from mandatory Title II common carrier regulation. Any decision, therefore, to impose Title II regulation through the Commission's ancillary jurisdiction would render those decisions meaningless. While Title III regulation was initially used, in part, as a basis for imposing manual roaming obligations on CMRS providers, the rudimentary data services available then – and the law surrounding them – have evolved dramatically since that time.

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Verizon Wireless hereby submits these reply comments in response to the Further Notice of Proposed Rulemaking (“FNPRM”) released by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding.¹ In the FNPRM, the Commission seeks comment on whether it should extend the automatic roaming requirement to non-interconnected services or features, including services that have been classified as information services, such as wireless broadband Internet access service, or other non-CMRS services offered by CMRS providers.²

The Commission lacks legal authority to extend the automatic roaming obligation to the services addressed in the FNPRM. In particular, the recent *Wireless Broadband Internet Access Declaratory Ruling* (“*WBIA Ruling*”) ³ – in which the Commission definitively concluded that wireless broadband Internet access services are information

¹ Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 05-265, FCC 07-143 (rel. August 16, 2007) (hereinafter “Report and Order” or “FNPRM,” where applicable).

² *Id.* at 29 ¶ 77.

³ Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, WT Docket No. 07-53, *Declaratory Ruling*, 22 FCC Rcd 5901 (2007).

services and not CMRS – precludes imposition of the common carrier-based automatic roaming regulatory requirements contemplated in this proceeding. Moreover, neither Title I nor Title III provides a jurisdictional basis to extend the automatic roaming obligation to information and non-interconnected services.

I. THE COMMISSION HAS NO LEGAL AUTHORITY TO EXTEND AUTOMATIC ROAMING OBLIGATIONS TO INTERNET ACCESS SERVICES OR NON-INTERCONNECTED SERVICES AND FEATURES

Verizon Wireless and others demonstrated in their comments that the Commission lacks legal authority to extend automatic roaming obligations to information services or non-interconnected services.⁴ Various commenters contest this point, claiming that the Commission’s authority to impose automatic data roaming requirements can be derived from Title II of the Act, or in the alternative, from Title I and/or Title III. As shown below, none of these arguments can withstand scrutiny.

A. Internet Access Services and Other Non-Interconnected Services Are not Common Carrier Services and Thus Are Exempt from Title II Regulation.

The record reflects there is no real dispute that wireless broadband Internet access services are information services. Indeed, as the *WBIA Ruling* stated, “wireless broadband Internet access service offers a single, integrated service to end users, Internet access, that inextricably combines the transmission of data with computer processing, information provision, and computer interactively, for the purpose of enabling end users to run a variety of applications. These applications . . . taken together constitute an

⁴ See AT&T Inc. (“AT&T”) Comments at 11-17; Sprint Nextel Corporation (“Sprint Nextel”) Comments at 3-9; Wireless Communications Ass’n International, Inc. (“WCA”) Comments at 7-8.

information service as defined by the Act.”⁵ Some commenters contend, however, that Title II governs when such services are provided in the roaming context.⁶ Their argument fails on several counts.

First, commenters’ claims are flatly inconsistent with the Commission’s conclusion in the Report and Order that “automatic roaming, as a common carrier obligation, does not extend to services that are classified as information services or to other services that are not CMRS.”⁷ Adoption of these commenters’ position would require the Commission to reverse its finding that wireless broadband Internet access services are information services or, as discussed *infra* in Section I.B, to conclude that bedrock common carrier obligations now apply to information services. There is no basis for the Commission to take either action.

Some commenters would have the Commission ignore longstanding precedent and analyze roaming as a service between two carriers, rather than as an end-user service.⁸ The Commission has already rejected this approach, however, on two separate occasions, most recently in this very proceeding. In 1996, when the Commission first addressed the appropriate classification of roaming, it concluded that the host operator

⁵ *WBIA Ruling*, 22 FCC Rcd 5901, ¶ 26 (internal citation omitted). As Verizon Wireless stated in its comments, the Commission’s analysis in the *WBIA Ruling* must be extended to narrowband information and other non-interconnected data services, as well. These narrowband offerings, from the perspective of classification, possess the same characteristics as wireless broadband Internet access services, albeit at slower throughput rates. Verizon Wireless Comments at 4.

⁶ See Leap Wireless International, Inc. (“Leap”) Comments at 2-4; Rural Cellular Association (“RCA”) Comments at 6-8; SouthernLINC Wireless (“SouthernLINC”) Comments at 22-47; SpectrumCo LLC (“SpectrumCo”) Comments at 12-20.

⁷ Report and Order at ¶ 60.

⁸ See Leap Comments at 2-3; RCA Comments at 6; SouthernLINC Comments at 32-43; SpectrumCo Comments at 12-14.

was providing a common carrier service subject to Title II because the *end user* was obtaining a common carrier service.⁹ In reaching this conclusion, the Commission expressly rejected a classification analysis based on the relationship between the two carriers. In the Report and Order adopted this past August, the Commission “reiterate[d]” this “earlier determination that roaming is a common carrier service because roaming capability gives *end users* access to a foreign network in order to communicate-messages of their own choosing.”¹⁰ It is the end-user service paradigm that guides the analysis.¹¹

None of the commenters makes any attempt to refute or distinguish these earlier findings. Proponents of expanding the roaming requirement to include data roaming instead rely heavily on the *Time Warner* decision, and that reliance is misplaced.¹² First, *Time Warner* involved statutory provisions not at issue here – whether a wholesale provider of telecommunications services is a telecommunications carrier for purposes of the rights afforded by sections 251(a) and (b) of the Act. Moreover, that case involved

⁹ Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, *Second Report and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 9462, 9468-69 (1996).

¹⁰ Report and Order at ¶ 1 (emphasis added).

¹¹ The Commission likewise focused on the end user when it determined in the *WBIA Ruling* that wireless broadband Internet access services are information services and not common carrier services. The Commission found “that an end user subscribing to wireless broadband Internet access service expects to receive (and pay for) a finished, functionally integrated service that provides access to the Internet, rather than receive (and pay for) two distinct services – Internet access service and a distinct transmission service.” *WBIA Ruling*, 22 FCC Rcd 5901 ¶ 31.

¹² 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 Service to VoIP Providers, WC Docket No. 06-55, *Memorandum Opinion and Order*, 22 FCC Rcd 3513 (WCB rel. Mar. 1, 2007).

Time Warner Cable's ("TWC") purchase of discrete telecommunications services from an ILEC, which TWC then used as a wholesale input to the information services it provided to its own customers. 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 services in determining the classification of the service provided by the ILEC to TWC.

Roaming, however, is an integrated service provided to the end user through the cooperative efforts of two operators. Unlike the discrete transport link involved in *Time Warner*, the host operator in the data roaming context plays a significant role, and certainly engages in far more activity than simply providing a “dumb pipe.”¹³ Neither SpectrumCo nor SouthernLINC dispute Verizon Wireless's point that “e-mail, Internet browsing, photo transmission, and other data services ‘are indisputably classified as information services,’” but rather claim that in the roaming context, these services are being provided by the home operator, not the host operator.¹⁴ These statements are factually incorrect. As noted in the Verizon Wireless Letter, it is commonplace for a

¹³ See Letter from Andre J. Lachance, Senior Counsel, Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265 (filed July 20, 2007) (“Verizon Wireless Letter”).

¹⁴ SpectrumCo Comments at 14; SouthernLINC Comments at 37.

roamer to obtain access to the host carrier's *own* Internet connection for web browsing.¹⁵ Indeed, as indicated in Verizon Wireless's comments, where roaming partners employ Simple IP, the host carrier network assigns the IP address for the data session and security measures put in place by the host carrier to protect the network will apply to the data session.¹⁶

Commenters' arguments would fail in any event even if the Commission were to abandon its earlier precedent and focus instead on the carrier-to-carrier relationship for purposes of classifying data roaming. First, the Commission found in the *WBIA Ruling* "that the transmission component of the wireless broadband Internet access service is 'telecommunications' and that the offering of the telecommunications transmission component as part of a functionally integrated Internet access service offering is not 'telecommunications service' under section 3 of the Act."¹⁷ Moreover, the Commission determined in the *WBIA Ruling* that "neither the Communications Act nor relevant precedent mandate that broadband transmission be a telecommunications service when provided to an ISP as a wholesale input for the ISPs' own broadband Internet access

¹⁵ See also Sprint Nextel Comments at 2 (stating that with a data roaming agreement, the home carrier's customers "will be able to access the Internet or other information provided by the facilities – based carrier or the web sites and platforms operated by the home carrier"). As noted in the Verizon Wireless Letter, a CDMA operator 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. SIP may be provided using either direct access or Layer 2 Tunneling Protocol. When SIP direct access is used, which occurs often, the host operator provides the roamer with an IP address and access to the host's own Internet connection for web browsing. Verizon Wireless Letter at 1-2.

¹⁶ Verizon Wireless Comments at 13-14.

¹⁷ *WBIA Ruling*, 22 FCC Rcd 5901 ¶ 1.

service offering.”¹⁸ Accordingly, as Sprint Nextel notes, wireless broadband access providers “are not required to make the transmission component of their networks available to others, including ISPs such as the home carrier.”¹⁹

In sum, data roaming service is not a wholesale transmission offering and cannot be classified as an intercarrier service. Moreover, the transmission component of a wireless broadband Internet access service is not classified as a common carrier service subject to Title II. Accordingly, claims that data roaming is governed by Title II are without merit.

B. Title I Does Not Provide A Jurisdictional Basis To Impose An Automatic Roaming Requirement on Information Services or Non-Interconnected Services and Features.

The Commission must reject the contention of some commenters that Title I of the Communications Act provides sufficient authority to impose automatic roaming obligations on information services or non-interconnected services and features.²⁰ Title I authorizes the Commission to “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.”²¹ The Commission is thus not permitted to exercise its Title I authority in a manner that would contravene any statutory provision. That is precisely what would occur here if data roaming obligations were imposed.

Section 153(44) of the Act provides that “a telecommunications carrier shall be treated as a common carrier under this Act only to the extent that is engaged providing

¹⁸ *Id.* ¶ 32.

¹⁹ Sprint Nextel Comments at 3.

²⁰ *See* Leap Comments at 3-4; RCA at 67; SouthernLINC Comments at 43-47; SpectrumCo Comments at 17-20.

²¹ 47 U.S.C. § 154(i).

telecommunications services”²² In the *WBIA Ruling*, the Commission expressly found that wireless broadband Internet access services are not common carrier services, and it noted, citing the *Brand X* decision,²³ that the Supreme Court upheld “the Commission’s conclusion that cable companies that sell broadband Internet service do not provide telecommunications services and therefore are exempt from mandatory Title II common carrier regulation.”²⁴ The Act thus prohibits the Commission from imposing common carrier regulatory obligations on entities insofar as they are providing non-common carrier services, as would be the case here.

It is essential, moreover, to add context to this limitation on the Commission’s authority. The Report and Order based the automatic roaming rule on Sections 201 and 202 of the Act. Broadening that rule to include data roaming would subject these information services to those sections, which on their face apply only to common carriers. AT&T emphasized that “the Commission would abuse its authority if it attempted to impose the kind of economic regulation that a roaming requirement represents.”²⁵ AT&T also noted that this conclusion is consistent with recent precedent: “as the Commission explained in the *Free World Dialup Order*, exercising Title I

²² 47 U.S.C. § 153(44).

²³ *National Cable & Telecommun. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (“*Brand X*”).

²⁴ *WBIA Ruling*, 22 FCC Rcd 5901 ¶ 5. This limitation on the Commission’s Title I ancillary authority was underscored by the Supreme Court in an analogous case involving cable operators. In *Midwest Video*, the Commission was found to have exceeded its Title I authority when it imposed common carrier type obligations on cable providers who were analogized to the command set forth in section 3(h) of the Act that “a person engaged . . . in broadcasting shall not . . . be deemed a common carrier.” *FCC v. Midwest Video Corp. et al.*, 440 U.S. 689, 700 (1979). The Commission would similarly overstep its authority, as delimited by section 153(44), if it imposed common carrier regulation on non-common carrier data services.

²⁵ AT&T Comments at 16.

jurisdiction to impose ‘economic regulation’ on the Internet-based information service at issue there ‘would not only run counter to our decades old goals and objectives to enable information services to function in a freely competitive environment, but would directly contravene Congress’s express directives in section 706 and 230 of the Act that services such as FWD not be subject to such regulation.’”²⁶ Adoption of a data roaming requirement would also undermine the deregulatory goals which form the basis of the Telecommunications Act of 1996.²⁷ In short, statutory limitations, relevant precedent and Congressional policy directives preclude the broad interpretation of Title I advocated by the data roaming proponents.

Some commenters point to various decisions by the Commission imposing certain Title II obligations, such as Enhanced 911 (“E911”), Customer Proprietary Network Information (“CPNI”), disability access and universal service, in support of the FCC’s authority to adopt a data roaming obligation.²⁸ In each of those instances, however, the Commission exercised its ancillary authority narrowly in furtherance of express statutory

²⁶ *Id.* (citing Petition for Declaratory Ruling That Pulver.com’s Free World Dialup Is Neither Telecommunications nor a Telecommunications Service, *Memorandum Opinion and Order*, 19 FCC Rcd 3307, 3319-20 ¶ 19 n. 69 (2004)).

²⁷ The preamble to the 1996 Act specifies that the Act’s purpose is “to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.” Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996); *see also* AT&T Comments at 16.

²⁸ *See, e.g.*, Leap Comments at 3-4; SouthernLINC Comments at 45-46; SpectrumCo Comments at 18-19.

objectives.²⁹ In contrast, no provision of Title II addresses roaming. Moreover, none of those examples involved imposition of the *core* common carrier regulatory obligations that are present here.³⁰ As noted by AT&T, “[a] regulation imposing roaming requirements is thus distinct from regulations promulgated under what have been deemed the ‘public policy’ provisions of Title II.”³¹ These prior decisions simply do not support

²⁹ The orders applying E911, privacy and disability access requirements to VoIP providers relied on statutory provisions interpreted as promoting the application of such requirements to telephone substitutes. *See* IP-Enabled Services, WC Docket No. 04-36, *First Report and Order*, 20 FCC Rcd 10245, 10246 ¶ 26 (2005) (imposing E911 requirements as ancillary to section 251(e)), *aff'd*, *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006); Implementation of the Telecommunications Act of 1996, CC Docket No. 96-115, *Report and Order*, 22 FCC Rcd 6927 ¶¶ 56-58 (imposing CPNI requirements as ancillary to the Commission’s section 222 responsibilities); IP-Enabled Services, WC Docket No. 04-36, *Report and Order*, 22 FCC Rcd 11275 ¶¶ 2-6 (imposing disability access requirements as ancillary to the Commission’s responsibilities under sections 225 and 255); Universal Service Contribution Methodology, WC Docket No. 06-122, *Report and Order*, 21 FCC Rcd 7518, 7538-41 ¶¶ 38-45 (2006) (finding that section 254(d) authorized the Commission to apply universal service obligations to information service providers insofar as they provide interstate telecommunications), *aff'd in relevant part*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007). Moreover, the Commission imposed requirements pursuant to the Communications Assistance for Law Enforcement Act (“CALEA”) on VoIP providers only after it determined that CALEA’s definition of “telecommunications carrier” differed from the Communications Act’s definition of that term. CALEA and Broadband Access and Services, ET Docket No. 04-295, *First Report and Order*, 20 FCC Rcd 14989, 14992-15001 ¶¶ 9-23 (2005), *aff'd*, *American Council on Education v. FCC*, 451 F.3d 226 (D.C. Cir. 2006).

³⁰ *See, e.g.*, Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, § 6002(b), 107 Stat. 312 (1993) (giving the Commission broad authority to forbear from applying all provisions of Title II to CMRS providers except for sections 201, 202 and 208).

³¹ AT&T Comments at 16 n.37 (citing Petition of AT&T for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services, *Memorandum Opinion and Order*, FCC 07-180 (rel. Oct. 12, 2007) at ¶¶ 71-73).

the expansive reading of Title I being pressed by proponents of a data roaming obligation.³²

C. Title III Does Not Authorize The Commission To Impose Roaming Obligations On CMRS Providers.

Some commenters contend that Title III provides another jurisdictional source of authority that would support mandatory data roaming requirements. These commenters significantly overstate the reach of Title III.³³

As is the case with Title I, there is an express statutory limitation on the scope of the Commission's Title III authority. Specifically, section 303(r) of the Act provides that the Commission may "[m]ake such rules and regulations and prescribe such restrictions and conditions *not inconsistent with law*, as may be necessary to carry out the provisions of this Act"³⁴ Consistent with that directive, SouthernLINC notes that the Commission itself recently addressed the scope of its Title III authority when it "stated that, as a general matter, it 'has the authority to establish license conditions and operational obligations . . . if the condition or obligation will further the goals of the Commission's Act *without contradicting any basic parameters* of the agency's authority.'"³⁵ The statutory constraint mandated by section 303(r) of the Act, when read in conjunction with section 153(44) of the Act (which authorizes the Commission to

³² As WCA notes, the United States Court of Appeals for the District of Columbia Circuit recently ruled that the Commission's ancillary authority under Title I is not boundless. See WCA Comments at 7-8 (citing *American Library Ass'n v. FCC*, 406 F. 3d 689, 700 (D.C. Cir. 2005)).

³³ See Leap Comments at 4; RCA at 8; SouthernLINC Comments at 22-32; SpectrumCo Comments at 15-17.

³⁴ 47 U.S.C. § 303(r) (emphasis added).

³⁵ See SouthernLINC Comments at 24 (citing Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, *Second Report and Order*, 22 FCC Rcd 15289 ¶ 207 (2007) (emphasis added)).

impose common carrier obligations on entities only insofar as they are engaged in providing telecommunications services), precludes the Commission's exercise of its Title III authority in the manner suggested by proponents of a data roaming requirement.

It bears noting once again that the Commission, if it were to accept the arguments of the data roaming proponents, would be subjecting *non*-common carrier services to sections 201, 202 and 208 of the Act – which on their face apply only to common carrier services. By any reasonable measure, such action would amount to an impermissible exercise of its Title III authority.³⁶

Some commenters note that the Commission relied, in part, on Title III in the past when it imposed a manual roaming obligation on data services, as well as establishing a resale obligation applicable to non-Title II components of the service.³⁷ That exercise of authority was never challenged, however, and nothing in Title II references roaming. Moreover, the Commission assumed that the voice services at issue qualified as Title II services – now regulated as CMRS. The rudimentary data services available then – and the law surrounding them – have evolved dramatically since that time. In particular, the Commission has ruled that wireless broadband Internet access services (and broadband Internet access services provided over other platforms) are not CMRS “and therefore are exempt from mandatory Title II common carrier regulation.”³⁸ The analysis underlying

³⁶ See also AT&T Comments at 15-16 (noting that adoption of Title II regulatory requirements for data roaming would run contrary to the Commission's stated objectives of allowing information services to function in an unregulated environment and contravene Congress's express directives found in section 706 and 230 of the Act).

³⁷ See Leap Comments at 4; SouthernLINC Comments at 27-29.

³⁸ *WBIA Ruling*, 22 FCC Rcd 5901 ¶ 5

that determination was upheld by the Supreme Court.³⁹ These Commission decisions were based on a proper reading of the statute and related precedent. Title III does not authorize the Commission to take actions that would contravene express limitations on the Commission's authority found elsewhere in the Act.

II. CONCLUSION

The Commission should not impose an automatic roaming requirement on services that have been classified as information services, such as wireless broadband Internet access service, or other non-CMRS services offered by CMRS providers. The Commission lacks legal authority to extend the automatic roaming obligation to the services addressed in the FNPRM.

Respectfully submitted,

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³⁹ *Brand X*, 545 U.S. at 967.