

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993	)	WT Docket No. 09-66
	)	
Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless including Commercial Mobile Services	)	
	)	
Fostering Innovation and Investment in the Wireless Communications Market	)	GN Docket No. 09-157
	)	
A National Broadband Plan For Our Future	)	GN Docket No. 09-51
	)	
Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers	)	WT Docket No. 05-265
	)	

To: The Commission

**REPLY COMMENTS OF SOUTHERNLINC WIRELESS**

By:

Shirley S. Fujimoto  
David D. Rines  
McDERMOTT WILL & EMERY LLP  
600 Thirteenth Street, N.W.  
Washington, D.C. 20005-3096  
T: 202.756.8000  
F: 202.756.8087

Holly Henderson  
External Affairs Manager  
SouthernLINC Wireless  
5555 Glenridge Connector, Suite 500  
Atlanta, Georgia 30342  
T: 678.443.1500

Michael D. Rosenthal  
Director of Legal and External Affairs  
SouthernLINC Wireless  
5555 Glenridge Connector, Suite 500  
Atlanta, GA 30342  
T: 678.443.1500

Attorneys for SouthernLINC Wireless

Dated: October 22, 2009

## TABLE OF CONTENTS

	<b>Page</b>
<b>I. INTRODUCTION AND SUMMARY .....</b>	<b>2</b>
<b>II. AUTOMATIC ROAMING IS NECESSARY FOR COMPETITION, INNOVATION AND INVESTMENT, AND BROADBAND DEPLOYMENT .....</b>	<b>3</b>
<b>III. DEFINING “AUTOMATIC ROAMING” .....</b>	<b>6</b>
<b>IV. THE COMMISSION HAS AMPLE AUTHORITY TO ADOPT AUTOMATIC ROAMING OBLIGATIONS FOR DATA SERVICES.....</b>	<b>7</b>
<b>A. The Commission’s Authority Under Title III of the Act .....</b>	<b>9</b>
<b>B. The Commission’s Authority Under Title II of the Act .....</b>	<b>12</b>
<b>C. The Commission’s Authority Under Title I of the Act.....</b>	<b>14</b>
<b>V. CONCLUSION .....</b>	<b>16</b>

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993	)	WT Docket No. 09-66
	)	
Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless including Commercial Mobile Services	)	
	)	
Fostering Innovation and Investment in the Wireless Communications Market	)	GN Docket No. 09-157
	)	
A National Broadband Plan For Our Future	)	GN Docket No. 09-51
	)	
Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers	)	WT Docket No. 05-265

To: The Commission

**REPLY COMMENTS OF SOUTHERNLINC WIRELESS**

Southern Communications Services, Inc. d/b/a SouthernLINC Wireless (“SouthernLINC Wireless”) hereby submits its reply comments in response to the Federal Communications Commission’s *Notice of Inquiry* on competition in the mobile wireless market for its newly-renamed Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless including Commercial Mobile Services (“*Mobile Wireless Competition Report*”).<sup>1</sup>

---

<sup>1</sup> / *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless including Commercial Mobile Services*, WT Docket No. 09-66, Notice of Inquiry, FCC 09-67 (rel. Aug. 27, 2009) (“*NOP*”). The deadline for filing reply comments was subsequently extended until October 22, 2009. See Public Notice, DA 09-2207 (rel. Oct. 9, 2009).

## I. INTRODUCTION AND SUMMARY

During the initial round of comments filed in response to this *NOI*, numerous mobile wireless carriers and carrier groups stated that one of the greatest barriers still standing between the current structure of the wireless market and the goal of making mobile wireless services available to all Americans is the lack of any obligation for mobile wireless service providers to provide automatic roaming for all mobile wireless services – including data services – at a reasonable rate and on reasonable terms and conditions.<sup>2</sup> Although the Commission has a separate docket still open on automatic roaming,<sup>3</sup> no action has been taken by the Commission in this docket in over two years.

Because the pressing need for Commission action on automatic roaming has become such a central issue in the instant *NOI* and other pending proceedings – including the Commission’s separate proceedings on wireless innovation and on the development of a national broadband plan<sup>4</sup> – and because of the amount of time that has passed since the close of the last formal

---

<sup>2</sup> / See Comments of T-Mobile at 24 – 26 (filed Sept. 30, 2009); Comments of Cricket Communications (filed Sept. 30, 2009); Comments of the National Cable & Telecommunications Association at 4 (filed Sept. 30, 2009); Comments of Bright House Networks (filed Sept. 30, 2009); Comments of United States Cellular Corp. at 14 – 17 (filed Sept. 30, 2009); Comments of Cincinnati Bell Wireless LLC (filed Sept. 30, 2009); Comments of MetroPCS at 22 – 35 (filed Sept. 30, 2009); Comments of the Rural Cellular Association at 11 – 13 (filed Sept. 30, 2009); Comments of Cellular South, Inc. at 18 (filed Sept. 30, 2009); Comments of the Rural Telecommunications Group at 4 – 5 (filed Sept. 30, 2009); Comments of NTELOS (filed Sept. 30, 2009); Comments of the National Telecommunications Cooperative Association at 3 – 4 (filed Sept. 30, 2009).

<sup>3</sup> / *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817 (2007) (“*2007 Roaming Order*” and “*Data Roaming FNPRM*”).

<sup>4</sup> / *Fostering Innovation and Investment in the Wireless Communications Market, A National Broadband Plan for Our Future*, GN Docket Nos. 09-157, 09-51, Notice of Inquiry, FCC 09-66 (rel. Aug. 27, 2009); *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Notice of Inquiry, FCC 09-31 (rel. April 8, 2009). Several of the parties listed in note 2, *supra*, also submitted comments in these dockets regarding automatic roaming. See also

pleading cycle in the still-pending roaming proceeding, SouthernLINC Wireless hereby submits the following reply comments in the above-captioned proceedings for the express purpose of refreshing the record in all of these proceedings – for the convenience of the Commission and all parties – regarding the Commission’s legal authority to take prompt action on automatic roaming for all mobile wireless services.

The reply comments below serve primarily as a summary and overview of the in-depth analyses that SouthernLINC Wireless has provided in its previous filings in the roaming docket.<sup>5</sup> SouthernLINC Wireless hereby incorporates these previous filings by reference and respectfully requests that they be included in the Commission’s consideration of the roaming issues raised in the proceedings presently before it.

## **II. AUTOMATIC ROAMING IS NECESSARY FOR COMPETITION, INNOVATION AND INVESTMENT, AND BROADBAND DEPLOYMENT**

Although the Commission has a separate proceeding dedicated to roaming, no action has been taken in this docket in over two years. Meanwhile, industry consolidation and the inability of many wireless carriers to obtain reasonable roaming arrangements – or, in the case of data services, to obtain any roaming arrangements whatsoever – have combined to inhibit competition in the mobile wireless market.<sup>6</sup>

---

Comments of Comcast Corporation, GN Docket Nos. 09-157, 09-51, at 13 – 16 (filed Sept. 30, 2009).

<sup>5</sup> / *Data Roaming FNPRM*, Comments of SouthernLINC Wireless (filed Oct. 29, 2007) (“SouthernLINC Wireless Data Roaming Comments”); *Data Roaming FNPRM*, Reply Comments of SouthernLINC Wireless (filed Nov. 28, 2007) (“SouthernLINC Wireless Data Roaming Reply Comments”); Letters from Christine M. Gill, Counsel for SouthernLINC Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265 (filed July 2, 2007; July 24, 2007; and Feb. 1, 2008).

<sup>6</sup> / *See, e.g.*, Comments of the Rural Cellular Association; Comments of Cricket Communications.

Consumers expect to be able to use their wireless handsets when they travel outside their local areas. As RCA stated, “For smaller regional and rural carriers to be able to maintain their competitive position ... [they] must be in a position to meet their customers’ expectations regarding the range and scope of services [they] are able to provide.”<sup>7</sup> However, as Cincinnati Bell Wireless stated, “If small and regional carriers cannot offer customers seamless nationwide data roaming in the converged marketplace, their service offerings will be severely limited ... In other words, if competition in the wholesale roaming market is allowed to languish, the ultimate result will be that smaller competitors are marginalized or driven out of operation as a duopoly wireless market is created.”<sup>8</sup>

Tellingly, the impact of automatic roaming on competition is so significant that T-Mobile, the nation’s fourth-largest wireless carrier, is now calling on the Commission to take action. In its initial comments in this proceeding, T-Mobile stated that “the Commission should extend the automatic roaming rule to apply to data services generally, including wireless broadband Internet access, to allow consumers access to the same broadband services (2G and 3G) while traveling as they have at home.”<sup>9</sup> According to its comments, “T-Mobile’s experience since 2007 strongly suggests that, without Commission oversight, roaming for data services will not be provided at reasonable rates, terms, and conditions, or may be withheld altogether, diminishing competition at the retail level and harming consumers.”<sup>10</sup>

Several commenters in this proceeding also pointed out that, as Bright House Networks stated, “entry into the wireless market is rendered virtually impossible without access to

---

<sup>7</sup> / Comments of the Rural Cellular Association at 11 – 12.

<sup>8</sup> / Comments of Cincinnati Bell Wireless at 3.

<sup>9</sup> / Comments of T-Mobile at 25.

<sup>10</sup> / Comments of T-Mobile at 26.

automatic roaming on commercially reasonable bases for all wireless services – voice or data – provided over any wireless device.”<sup>11</sup> Not only does the lack of automatic roaming thwart investment by new entrants, it also inhibits investment by existing regional and rural carriers in new technologies and services, including wireless broadband. As MetroPCS explained:

If a customer is unable to receive data when they roam from a particular carrier, it is unlikely the customer will buy service from that carrier. This simple restriction [*i.e.*, the unavailability of data roaming] will deter small, rural and regional carriers from investing in broadband at the exact time such investment is sorely needed to meet the objectives of the national broadband plan. The only way to ensure that this investment occurs is to enable carriers to offer customers the ability to roam and use these data services, which would allow carriers to recoup their investment in broadband technology.<sup>12</sup>

Bright House Networks, among others, further noted that the “provision of broadband services using wireless technology will be a critical method by which the FCC can achieve the goal of ensuring that broadband services are available to all Americans.”<sup>13</sup> However, Bright House Networks also cautioned that it and other service providers “can expand the provision of broadband services through wireless technology only if the FCC removes the barriers to its provision of wireless services,” including the barriers currently imposed by the unavailability of automatic roaming for all mobile wireless services on reasonable terms and conditions.<sup>14</sup>

Thus, as the comments in the Commission’s parallel proceedings on mobile wireless competition and wireless innovation and investment make clear, automatic roaming for all mobile wireless services is necessary to promote competition in the mobile wireless market,

---

<sup>11</sup> / Comments of Bright House Networks at 8; *See also* Comments of Comcast Corporation in GN Docket No. 09-157 at 13 – 16 (“Comcast’s comments here seek to emphasize the detrimental effect that the Commission’s exclusion of home and data roaming from automatic roaming rights has on competition – and hence on investment and innovation.”).

<sup>12</sup> / Comments of MetroPCS at 34.

<sup>13</sup> / Comments of Bright House Networks at 4.

<sup>14</sup> / *Id.*

encourage and foster innovation and investment in the wireless communications market, and facilitate the deployment of mobile wireless broadband services to consumers in rural and underserved areas across the nation. As SouthernLINC Wireless' following reply comments demonstrate, the Commission already has ample legal authority to take prompt action to make automatic roaming for all mobile wireless services available to all Americans – an essential step towards achieving the Commission's important public policy goals.

### III. DEFINING “AUTOMATIC ROAMING”

In order to determine the role that automatic roaming plays in mobile wireless competition, as well as the scope of the Commission's authority with respect to automatic roaming for all mobile wireless services, including data services, it is necessary to first define what “automatic roaming” is.

As described by the Commission, automatic roaming allows a subscriber of one wireless service provider to utilize the facilities of another wireless service provider to initiate or receive communications without taking any special actions (*e.g.*, providing a credit card number, inserting a different SIM card, etc.).<sup>15</sup> There is no contractual or other service arrangement between the roaming end user and the host carrier that operates the roamed-on system. Rather, “[a]utomatic roaming requires a pre-existing contractual arrangement between the [roamer's] home [carrier] and the roamed-on host system.”<sup>16</sup> As the Commission further explained:

Before a subscriber can complete an originating call under an automatic roaming arrangement, the host system first identifies the subscriber's home carrier ... *verifies that it has an automatic roaming arrangement with that carrier*, and queries the home carrier to verify that the subscriber's account is current (and in

---

<sup>15</sup> / *See, e.g., Reexamination of Roaming Obligations of Commercial Mobile Service Providers*, WT Docket No. 05-265, Memorandum Opinion & Order and Notice of Proposed Rulemaking, 20 FCC Rcd 15047, 15049 ¶ 3 (2005) (“*2005 Roaming NPRM*”).

<sup>16</sup> / *Id.*

some instances to obtain information about the subscriber, *such as his or her preferred service features*).<sup>17</sup>

In other words, a retail end user can obtain access to automatic roaming only if: (1) the end user's home carrier has an automatic roaming agreement with the host carrier; and (2) the end user is authorized to receive the automatic roaming service covered by that agreement. The roaming retail end user does not have any relationship with the host carrier. There is no contract between them, no billing relationship, no marketing relationship, and no customer care or service. All of these relationships exist exclusively between the roamer and his or her home carrier or, at the underlying wholesale level, between the home carrier and the host carrier.

Because the transaction and contractual relationship for the service is between two carriers, the provision of automatic roaming is a wholesale service that must be viewed and analyzed at the wholesale level when evaluating competition in the mobile wireless market,<sup>18</sup> as well as when evaluating the scope of the Commission's roaming authority.

#### **IV. THE COMMISSION HAS AMPLE AUTHORITY TO ADOPT AUTOMATIC ROAMING OBLIGATIONS FOR DATA SERVICES**

In its filings in the *Data Roaming FNPRM* proceeding and in separate correspondence to the Commission submitted as part of the roaming docket,<sup>19</sup> SouthernLINC Wireless provided detailed explanations and analyses demonstrating that the Communications Act provides the Commission with substantial statutory authority to take action with respect to roaming for all wireless services – including data services – regardless of the regulatory classification of the service provided to the retail end user. These sources of statutory authority include the Commission's plenary Title III authority over radio communication in general, the

---

<sup>17</sup> / *Id.* at note 9 (emphasis added).

<sup>18</sup> / *See* Comments of Cricket Communications; Comments of Cincinnati Bell Wireless.

<sup>19</sup> / *See* note 5, *supra*.

Commission's Title II authority over transmission services such as wholesale automatic roaming, and the Commission's ancillary jurisdiction under Title I of the Act. Moreover, each of these titles serves as a separate and independent basis for Commission action on roaming that is entirely consistent with case law and Commission precedent.

In summary:

- Automatic roaming for *all* wireless services – including data services – is subject to regulation pursuant to Title III of the Communications Act, which grants the Commission plenary authority over all radio transmission, regardless of whether it is a “telecommunications” or an “information” service, whether it is being provided on a common carrier or private carrier basis, or even whether it is interconnected with or otherwise “touches” the public switched network;
- Automatic roaming is a wholesale carrier-to-carrier transmission service that is a telecommunications service subject to the provisions of Title II of the Communications Act, regardless of the nature or regulatory classification of the finished retail service that is being provided to the retail end user; and
- Automatic roaming for all wireless services can be regulated pursuant to the Commission's authority under Title I of the Communications Act, regardless of how that service may otherwise be classified.

Not only does the Commission have substantial statutory authority over automatic roaming, but the Commission's exercise of this authority would also be fully consistent with federal court and Commission precedent, including the US Supreme Court's decision in the *Brand X* case,<sup>20</sup> as well as the Commission's own *Wireless Broadband Internet Access Order*, in which the Commission determined that wireless broadband Internet access is an information service and is not CMRS.<sup>21</sup>

---

<sup>20</sup> / *Nat'l Cable Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) (“*Brand X*”).

<sup>21</sup> / *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (“*Wireless Broadband Internet Access Ruling*” or “*WBLA Ruling*”).

### A. The Commission's Authority Under Title III of the Act

The Commission has ample authority to take action regarding roaming for all mobile wireless services pursuant to its plenary authority under Title III of the Communications Act to regulate the use of radio spectrum, regardless of the nature or classification of the service being provided.<sup>22</sup> It is irrelevant under Title III whether the service being provided is voice or data, whether it is a “telecommunications” or “information” service, whether it is being provided on a common carrier or private carrier basis, whether it is “CMRS,” or whether it is interconnected with or otherwise “touches” the public switched network.<sup>23</sup>

The Commission most recently addressed the scope of its Title III authority when it adopted an “open access” requirement for the 700 MHz “C Block” as part of its *700 MHz Order*.<sup>24</sup> In that Order, the Commission pointed to several additional sources of statutory

---

<sup>22</sup> / 47 U.S.C. § 301 (“It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.”).

<sup>23</sup> / See *Wireless Broadband Internet Access Ruling*, 22 FCC Rcd at 5914-15 ¶¶ 35 – 36. As the Commission stated, “Application of provisions governing access to and use of spectrum (and their corresponding Commission rules) is not affected by whether the service using the spectrum is classified as a telecommunications or information service under the Act.” *Id.*

<sup>24</sup> / *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 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*, WT Docket No. 06-150, CC Docket No. 94-102, WT Docket Nos. 01-309; 03-264; 06-169; PS Docket No. 06-229, WT Docket Nos. 96-86; 07-166, Second Report and Order, 22 FCC Rcd 15289 (2007) (“700 MHz Order”).

authority within Title III, including Sections 303, 303(r), and 309(j)(3).<sup>25</sup> Significantly, none of these provisions make any distinction based upon whether the service being provided by the licensee is a “telecommunications” or “information” service or whether the service touches the public switched network.

Moreover, both Title III and Commission precedent have firmly established that the touchstone for Commission action under Title III is the public interest. For example, in the *700 MHz Order*, the Commission stated that, “[w]hile the Commission strives to apply a consistent regulatory framework to like services, that does not obligate us to treat all spectrum-based services identically.”<sup>26</sup> The Commission further stated that it “has pursued a balanced spectrum policy that recognizes that, in certain instances, it may be necessary to vary the regulation of spectrum use *to achieve certain critical public interest objectives*.”<sup>27</sup> In no event does the Commission’s ability to exercise its Title III authority in order to achieve certain public interest objectives require a finding regarding the sufficiency of market forces or competition. To the contrary, the Commission stated, “[W]e have also recognized that with different policy goals – or under different circumstances – we may come to different conclusions regarding the extent of competition.”<sup>28</sup>

It is also well established that, among the measures the Commission may take pursuant to its statutory Title III authority, the Commission can choose to extend common carrier-type regulations to services that may not otherwise be considered common carrier services under Title

---

<sup>25</sup> / *Id.*, 22 FCC Rcd at 15365-66 note 471.

<sup>26</sup> / *Id.*, 22 FCC Rcd at 15363-64 ¶ 202.

<sup>27</sup> / *Id.* (citations omitted) (emphasis added).

<sup>28</sup> / *700 MHz Order*, 22 FCC Rcd at 15365 note 469 (citing *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 7988, ¶ 14 (1994)).

II or Section 332 of the Communications Act, if the Commission determines that doing so is in the public interest. One example of this is the Commission's adoption in the 1990s of the since-sunsetted CMRS resale rule, which covered both voice and data services offered by CMRS providers.<sup>29</sup> Citing Title III as the basis for its authority to adopt this rule, the Commission explicitly rejected arguments that data or other non-Title II services should be excluded.<sup>30</sup> Three years later, the Commission reaffirmed its position, stating:

Arguments that the scope of the [CMRS] resale rule is overbroad because it extends to non-Title II services are inapt. In the *First Report and Order*, the Commission rejected this argument and specifically cited its licensing authority as part of its jurisdictional authority for the resale rule. No party has challenged our explicit invocation of Title III as a basis for imposing the resale rule.<sup>31</sup>

The scope of the Commission's Title III authority remains just as broad today as it was in 1999, a point that was emphasized by the Commission's 2007 *WBIA Ruling* declaring that wireless broadband Internet access is an "information" service and is not CMRS.

First, the *WBIA Ruling* explicitly held that the Commission's decision to classify wireless broadband Internet access as an information service "does not affect the general applicability" of the Commission's Title III authority "because the service is using radio spectrum."<sup>32</sup> The Commission therefore stated that its "decision to classify wireless broadband Internet access

---

<sup>29</sup> / See *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, First Report and Order, 11 FCC Rcd 18455, 18459-60 (1996) ("Accordingly, we condition existing and future cellular, broadband PCS and covered SMR licenses upon compliance with our resale rule pursuant to our authority under Title III of the Act.") (citing 47 U.S.C. §§ 303(r) and 309).

<sup>30</sup> / *Id.* at 18471-72.

<sup>31</sup> / *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, et al., Memorandum Opinion & Order and Order on Reconsideration, 14 FCC Rcd 16340, 16352-53 ¶ 27 (1999) (internal citations omitted).

<sup>32</sup> / *Wireless Broadband Internet Access Ruling*, 22 FCC Rcd at 5914 ¶ 35.

services as information services does not affect the applicability of Title III provisions and corresponding Commission rules to these services.”<sup>33</sup>

Conversely, because Title III applies regardless of “whether the service using the spectrum is classified as a telecommunications or information service under the Act,”<sup>34</sup> the adoption of roaming obligations for all mobile wireless data services pursuant to Title III does not in any way affect the regulatory classification of these services. Thus, any action the Commission may take with respect to automatic roaming pursuant to Title III does not in any way affect (nor is it affected by) the Commission’s determination that wireless broadband Internet access is an information service and is not CMRS.

For the reasons set forth above, and as explained in more detail in SouthernLINC Wireless’ filings in the roaming docket,<sup>35</sup> the Commission has ample authority to take action regarding automatic roaming for all mobile wireless services pursuant to its plenary authority under Title III of the Communications Act.

#### **B. The Commission’s Authority Under Title II of the Act**

In addition to its plenary Title III authority, the Commission also has separate and independent authority with respect to roaming under Title II as well.<sup>36</sup> This conclusion, which is based on an analysis of automatic roaming at the wholesale carrier-to-carrier level, is fully

---

<sup>33</sup> / *Id.* at 5914-15 ¶ 36.

<sup>34</sup> / *Id.*

<sup>35</sup> / SouthernLINC Wireless Data Roaming Comments at 23 – 31; SouthernLINC Wireless Data Roaming Reply Comments at 14 – 18 and 22 – 23; Letter from Christine M. Gill, Counsel for SouthernLINC Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, dated Feb. 1, 2008.

<sup>36</sup> / *See* SouthernLINC Wireless Data Roaming Comments at 32 – 43; SouthernLINC Wireless Data Roaming Reply Comments at 14 – 17 and 21 – 22; Letter from Christine M. Gill, Counsel for SouthernLINC Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, dated Feb. 1, 2008.

supported by the statutory provisions of the Communications Act and Commission precedent. It is also consistent with the Commission's prior decisions on cable modem and wireline and wireless broadband Internet access services, as well as the Supreme Court's decision in the *Brand X* case.

As the Supreme Court held in *Brand X*, the definition of a service or product being offered by a company is determined by "what the consumer perceives to be the integrated finished product" that is being provided.<sup>37</sup> With wholesale automatic roaming, the "integrated finished product" that is being provided to and received and paid for by the consumer – *i.e.*, the carrier customer – is transmission and nothing more.<sup>38</sup>

Specifically, through a roaming agreement, the requesting carrier – *i.e.*, the carrier that is purchasing the automatic roaming service – specifies that traffic be transmitted between its network and the roaming subscriber's device (as identified through the device's Mobile Identification number, phone number, IP address, etc.). The host carrier does not change the form or content of the information sent or received by the roamer, nor does the host carrier provide additional services or functionalities. Rather, any functionality (beyond transmission) that the retail roaming end user may receive is supplied not by the host carrier, but by the roamer's home carrier, either directly or through a third party service provider. Using BlackBerry service as an example, the host carrier provides a roaming BlackBerry user with transmission of his or her signals to and from the BlackBerry device. The host carrier does not provide the roamer with the actual BlackBerry e-mail service – this service is instead provided

---

<sup>37</sup> / *Brand X*, 545 U.S. at 990.

<sup>38</sup> / *See 2007 Roaming Order*, 22 FCC Rcd at 15827 ¶ 25 ("As previously determined, 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.").

by the roamer's *home* carrier (in the case of BlackBerry, through the home carrier's contractual relationship with RIM).

It is also irrelevant that a carrier customer which purchases wholesale automatic roaming service from another carrier may utilize this wholesale transmission service as a component of a functionally integrated, finished information service that it provides to its own retail customers. As the Commission explicitly held in its 2007 ruling on the wholesale transport service used by Time Warner Cable as a component of its retail VoIP service offering, the classification of any retail service has no bearing on the classification of the underlying wholesale transmission service used to provide that service.<sup>39</sup> By the same token, the classification of the underlying wholesale automatic roaming service as a Title II transmission service would have no bearing on the regulatory classification of any wireless broadband Internet access services or other wireless services provided at the retail level. To the extent such retail services are determined to be information services, these determinations would be unaffected.

### **C. The Commission's Authority Under Title I of the Act**

Finally, the Commission also has separate and independent authority to take action regarding the provision of automatic roaming for all wireless services pursuant to its ancillary authority under Title I of the Communications Act.<sup>40</sup> This authority allows the Commission to impose special regulatory obligations, including certain common carrier obligations, on the

---

<sup>39</sup> / *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd 3513, 3520-21 ¶ 15 (2007).

<sup>40</sup> / *See* SouthernLINC Wireless Data Roaming Comments at 43 – 47; SouthernLINC Wireless Data Roaming Reply Comments at 18 – 21 and 23 – 25.

provision of a service regardless of how that service may otherwise be classified under the Act.<sup>41</sup> The Commission may use its Title I ancillary jurisdiction when (1) Title I gives the Commission subject matter jurisdiction over the service in question; and (2) the assertion of jurisdiction is reasonably ancillary to the effective performance of its various responsibilities.<sup>42</sup>

The Commission's subject matter jurisdiction over automatic roaming is clearly established in Section 2 of the Communications Act, which states:

The provisions of this act shall apply to all interstate and foreign communications by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided.<sup>43</sup>

As to the Commission's relevant responsibilities, these are set forth not only in Section 1 of the Act,<sup>44</sup> but also throughout Title III of the Act, including, but not limited to, Section 301, Section 303(b), Section 303(g), Section 303(r), and Section 309(j)(3).<sup>45</sup> In addition, the adoption of automatic roaming obligations would advance the policy goals and objectives of numerous other statutory provisions, such as Section 706 of the Telecommunications Act, which directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,"<sup>46</sup> and Sections 309(j)(3)(A) and (D) of the Communications Act, which require the Commission to "protect the public interest in the use of spectrum," to promote "the development and rapid deployment of new technologies, products,

---

<sup>41</sup> / See, e.g., *Brand X*, 545 U.S. at 996 (holding that the Commission "remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction.").

<sup>42</sup> / See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968).

<sup>43</sup> / 47 U.S.C. § 152(a).

<sup>44</sup> / 47 U.S.C. § 151.

<sup>45</sup> / 47 U.S.C. §§ 301, 303(b), 303(g), 303(r), and 309(j)(3).

<sup>46</sup> / Codified as 47 U.S.C. § 157 nt.

and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays,” and to promote “efficient and intensive use of the electromagnetic spectrum.”<sup>47</sup>

## V. CONCLUSION

In the absence of any requirement that mobile wireless service providers make automatic roaming available for all mobile wireless services, including data services, on a just, reasonable, and nondiscriminatory basis, competition and innovation in the mobile wireless services market will be further restricted and consumers further harmed. As set forth above, and as described in detail in SouthernLINC Wireless’ earlier filings in the roaming docket, the Commission has ample legal authority to take action that addresses roaming for all mobile wireless services, regardless of the regulatory classification of the service being provided to the retail end user.

First, the Commission may take action pursuant to its plenary Title III authority over radio communication in general. Because wholesale automatic roaming is, at its core, a transmission service, the Commission may also take action pursuant to its authority under Title II. Finally, the Commission could exercise its ancillary jurisdiction under Title I. Each of these titles serves as a separate and independent basis for Commission action on roaming that is entirely consistent with case law and Commission precedent.

By exercising its authority to adopt automatic roaming obligations for all mobile wireless services, the Commission will promote competition in the mobile wireless market, encourage and foster innovation and investment in the wireless communications market, and facilitate the deployment of mobile wireless broadband services to consumers in rural and underserved areas across the nation.

---

<sup>47</sup> / 47 U.S.C. §§ 309(j)(3)(A), (D).

**WHEREFORE, THE PREMISES CONSIDERED**, SouthernLINC Wireless respectfully requests the Commission to take action in this docket consistent with the views expressed herein.

Respectfully submitted,

**SOUTHERNLINC WIRELESS**



Shirley S. Fujimoto  
David D. Rines  
McDERMOTT WILL & EMERY LLP  
600 Thirteenth Street, N.W.  
Washington, D.C. 20005-3096  
T: 202.756.8000  
F: 202.756.8087

Michael D. Rosenthal  
Director of Legal and External Affairs  
SouthernLINC Wireless  
5555 Glenridge Connector, Suite 500  
Atlanta, GA 30342  
T: 678.443.1500

Its Attorneys

Holly Henderson  
External Affairs Manager  
SouthernLINC Wireless  
5555 Glenridge Connector, Suite 500  
Atlanta, GA 30342  
T: 678.443.1500

Dated: October 22, 2009